(3)

Supreme Court, U.S.
FILED
FEB 22 2001

No. 00-763

In The

Supreme Court of the United States

SHARON B. POLLARD,

Petitioner,

v.

E.I. DUPONT DE NEMOURS COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 13, 2000
PETITION FOR CERTIORARI GRANTED JANUARY 8, 2001

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RELEVANT DOCKET ENTRIES

CIVIL DOCKET FOR CASE #: 95-CV-3010

1	12/20/95	COMPLAINT Receipt #: 025061; Filing fee $120.00 (tmn) [Entry date 12/21/95]
3	1/16/96	ANSWER by defendant E. I. DuPont to [1-1] (tmn) [Entry date 01/17/96]
17	5/30/97	MOTION by defendant E. I. DuPont for summary judgment, or in limine (wmw) [Entry date 06/02/97]
32	7/11/97	RESPONSE by plaintiff Sharon B. Pollard, plaintiff John A. Pollard to motion for summary judgment [17-1], to motion in limine [17-2] AND SUPPORTING MEMORANDUM OF FACTS AND LAW . . . (placed in separate folder) (ehg) [Entry date 07/15/97]
47	7/29/97	ORDER PARTIALLY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ORDER PARTIALLY GRANTING DEFENDANT'S MOTION IN LIMINE AND ORDER CONTINUING TRIAL by Judge Jon P. McCalla Granting motion for summary judgment [17-1] to the extent that it seeks to dismiss pltf's claim of negligent supervision, granted with

respect to pltf's claim for intentional infliction of emotional distress, granted with respect to Mr. Pollard's claim for loss of consortium, denied to the extent that it seeks summary judgment with respect to pltf's claims of sexual harassment under Title VII; motion in limine [17-2] seeking an order precluding pltf from offering proof of any alleged discriminatory acts prior to 12/20/94. . .for reasons set forth at the 7/22/97 pretrial conference, the court declines to resolve this issue at this time; terminating party John A. Pollard. Granting motion in limine [29-1] to the extent that it seeks to preclude pltf from utilizing, in any manner, the tape recordings. . . , pltf is ordered to produce all remaining tapes, if any, to dft by 7/30/97; denied to the extent it seeks to exclude the testimony or proof from Dr. Deperschmidt; instead the court modified the Rule 16(b) Scheduling Order . . . trial 9:30 10/14/97, pretrial conference 8:45 10/7/97, joint pretrial order, all motions in limine, proposed jury instructions, proposed voir dire questions due 5:00 9/30/97, pltf's Rule 26 expert disclosure due 8/12/97, dft's Rule 26 expert disclosure due 9/9/97; granting motion to continue setting [29-2] (cc: all counsel) (ssh) [Entry date 07/30/97] [Edit date 07/30/97]

64	10/14/97	MINUTES: Non-Jury Trial 10/14/97; opening remarks by Ms. Adams & Mr. Jacobson; Mr. Jacobson's motion to exclude Dr. Farmer's testimony - under advisement; Presiding Judge: McCalla; Pla Atty: K. Caldwell/Adams; Dft Atty: C. Jacobson C/R: Parker (wmw) [Entry date 10/15/97]
65	10/16/97	MINUTES: non-jury trial; pla's proof admitted-continued; Mr. Jacobson renewed motion to exclude Dr. Farmer's testimony in light of (2) suppl. reports - or to be allowed to depose Dr. Farmer - under advisement Presiding Judge: McCalla; Pla Atty: Caldwell/Adams; Dft Atty: Jacobson C/R: Parker (wmw) [Entry date 10/17/97]
66	10/17/97	MINUTES: . . .The trial will resume at 1:30 or 2:00 p.m. today Presiding Judge: McCalla; Pla Atty: Adams/Caldwell; Dft Atty: Jacobson; C/R: B. Parker (ssh) [Entry date 10/20/97] [Edit date 10/21/97]
71	10/24/97	MINUTES: Non-jury trial resumed 10/24/97; . . .[Entry date 10/28/97]
72	11/3/97	MINUTES: Trial resumed 11/3/97 . . . [Entry date 11/04/97]

73	11/4/97	MINUTES: non-jury trial continued 11/4/97; . . . [Entry date 11/05/97]
75	12/15/97	PROPOSED Findings of Fact and Conclusion of Law submitted by defendant E.I. DuPont (ssh) [Entry date 12/17/97]
88	12/22/97	PROPOSED Findings of Fact and Conclusions of law submitted by plaintiff Sharon B. Pollard (ssh) [Entry date 12/29/97]
91	8/20/98	MEMORANDUM OPINION AND ORDER: by Judge Jon P. McCalla . . Pla has, therefore, satisfied each of the elements necessary to prove that she was subjected to a hostile work environment based on her gender in violation of Title VII, and judgment is ENTERED in favor of pla as follows: 1) Dft is ORDERED to pay pla $107,364.00 in back pay and accrued benefits; 2) Dft is ORDERED to pay pla $300,000.00 in compensatory damages, in accordance with the statutory cap set forth in 42 USC 1981a(b)(3); and 3) Dft is ORDERED to pay pla's attorney fees and costs. Pla shall submit a statement of fees and costs related to this matter to the court by 9/15/98. Dft may file a response to pla's submittal by 9/30/98. The Court will then determine the appropriate amount of attorneys fees and costs to

		be awarded, and will so advise the parties. terminating case (cc: all counsel) (ehg) [Entry date 08/20/98]
92	8/20/98	JUDGMENT IN A CIVIL CASE: by Judge Jon P. McCalla re [91-2]. . in accordance with the Memorandum Opinion and Order, filed 8/20/98, judgment is entered in favor of plaintiff. .(cc: all counsel) (ehg) [Entry date 08/20/98]
98	9/17/98	NOTICE OF APPEAL by defendant E.I. DuPont from Dist. Court decision [92-1] (ehg) [Entry date 09/21/98]
102	9/21/98	NOTICE OF CROSS APPEAL by plaintiff Sharon B. Pollard from Dist. Court decision [92-1] (ehg) [Entry date 09/21/98]
103	9/21/98	MOTION AND SUPPORTING MEMORANDUM by defendant E.I. DuPont for stay of execution of judgment and waiver of the supersedeas bond requirement (ehg) [Entry date 09/22/98]
105	9/22/98	MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AWARD OF ATTORNEY FEES AND COSTS . . . by plaintiff Sharon B. Pollard (ehg) [Entry date 09/24/98]

113	10/2/98	RESPONSE by plaintiff Sharon B. Pollard to motion for stay of execution of judgment and waiver of the supersedeas bond requirement [103-1] (ehg) [Entry date 10/05/98]
117	10/14/98	RESPONSE IN OPPOSITION TO PLAINTIFF'S PETITION FOR ATTORNEY'S FEES w/ attachments . .by defendant E.I. DuPont to [105-1] (ehg) [Entry date 10/14/98]
119	10/27/98	ORDER STAYING EXECUTION OF JUDGMENT AND WAIVING SUPERSEDEAS BOND REQUIREMENT . . . by Judge Jon P. McCalla granting motion for stay of execution of judgment and waiver of the supersedeas bond requirement [103-1] (cc: all counsel) (ehg) [Entry date 10/27/98]
120	11/2/98	REPLY/KATHLEEN L. CALDWELL'S RESPONSE TO DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S PETITION FOR ATTORNEYS' FEES w/attachments by plaintiff Sharon B. Pollard re [105-1] (ehg) [Entry date 11/05/98]
128	12/9/98	ORDER OF ATTORNEYS' FEES AND COSTS. . .by Judge Jon P. McCalla .. The Court ORDERS Defendant to pay plaintiff's counsel

		$204,400 in fees and $12,497.99 in costs. For the reasons stated in the Court's 10/27/98 order in this matter, the Court STAYS execution of this judgment pending the appeal of this matter, and WAIVES the supersedeas bond requirement. (cc: all counsel) (ehg) [Entry date 12/09/98]
129	12/9/98	JUDGMENT IN A CIVIL CASE: by Judge Jon P. McCalla re [128-2]..in accordance with the Court's Order of Attorneys' Fees and Costs, judgment in the amount of $216,897.99 is hereby ENTERED in favor of plaintiff and against defendant. (cc: all counsel) (ehg) [Entry date 12/09/98]
132	12/28/98	NOTICE OF APPEAL by defendant E.I. DuPont from Dist. Court decision [129-1] (ehg) (regarding reward of atty fees & costs) [Entry date 12/30/98]
139	2/23/99	ORDER Entered: 2/17/99 from 6th Circuit dismissing the appeal [132-1] as duplicative (ssh) [Entry date 02/23/99]
140	5/30/00	JUDGMENT AND SLIP OPINION from USCA (entered 5/26/00): . . .it is ordered that the grant of summary judgment to dft is affirmed in part, reversed in part, and the case is remanded for trial in accordance with the opinion of this court. It is further ordered that the district court's award

		of atty's fees is affirmed. reversing and remanding the Decision of the District Court [Appeal [134-1], reversing and remanding the Decision of the District Court [Appeal [102-1], reversing and remanding the Decision of the District Court [Appeal [98-1] (ssh) [Entry date 05/31/00]
145	10/18/00	MOTION by plaintiff Sharon B. Pollard for attorney fees and costs (yds) (for appellate work) [Entry date 10/18/00]
162	12/4/00	NOTICE from the Supreme Court of the United States: the petition for a writ of certiorari was filed 11/13/00 and placed on the docket 11/13/00 as No. 00-763. (ssh) [Entry date 12/04/00]
165	12/15/00	CONSENT ORDER by Judge Jon P. McCalla: Pla's motion for award of attorneys fees and costs be and hereby stricken [145-1] (cc: all counsel) (ehg) [Entry date 12/18/00]
178	1/11/01	ORDER Of Stay by Judge Jon P. McCalla; The Supreme Court of the United States has granted certiorari from the decision of the Court of Appeals for Sixth Circuit in this matter; The court grant of a writ of certiorari operates as a stay of proceedings in lower courts; The court

		STAYS all proceedings in this matter pending the resolution of the appeal to the Supreme Court;, CASE STAYED (cc: all counsel) (bag) [Entry date 01/12/01]
180	1/16/01	NOTICE from the Supreme Court of the United States: the petition for a writ of certiorari is granted. (ssh) [Entry date 01/17/01]

CIVIL DOCKET FOR CASE: 98-CV-2147

1	2/18/98	COMPLAINT (Summons(es) issued) Receipt #: 36878; Filing fee $150.00; w/exhibits (bag) [Entry date 02/23/98]
9	4/6/98	ANSWER by defendant E.I. DuPont to [1-1] (ehg) [Entry date 04/08/98]
23	7/30/98	MOTION by defendant E.I. DuPont for summary judgment (ssh) [Entry date 07/31/98]
24	7/30/98	MEMORANDUM by defendant E.I. DuPont in support of motion for summary judgment [23-1] Placed in separate folder (ssh) [Entry date 07/31/98]
25	7/30/98	STATEMENT of undisputed material facts by defendant E.I. DuPont in support of motion for summary judgment [23-1] (ssh) [Entry date 07/31/98]

32	8/4/98	MOTION by plaintiff Sharon B. Pollard for summary judgment (ssh) [Entry date 08/04/98]
33	8/4/98	MEMORANDUM by plaintiff Sharon B. Pollard in support of motion for summary judgment [32-1] (ssh) [Entry date 08/04/98]
46	9/8/98	RESPONSE by plaintiff Sharon B. Pollard to dft's motion for summary judgment [23-1] (ssh) [Entry date 09/09/98]
49	3/30/99	ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT by Judge Jerome Turner granting in part and denying in part motion for summary judgment [32-1], granting motion for summary judgment and denying in part [23-1]. . .For the foregoing reasons, both pltf's and dft's motions for summary judgment will be treated as motions for judgment. Pltf's motion is denied with respect to her assertion that dft's denial of benefits under the disability plan was arbitrary and capricious, but is granted with respect to her assertion that dft's denial of benefits under the retirement plan was arbitrary and capricious. Correspondingly, dft's motion is granted with respect to its assertion that its denial of benefits under the disability plan was not arbitrary and

		capricious, but is denied with respect to its assertion that dft's denial of benefits under the retirement plan was not arbitrary and capricious. The parties shall have ten days from the entry of this order to file briefs regarding what damages pltf is entitled to. . . (cc: all counsel) (sk) [Entry date 03/30/99]
52	5/10/99	BRIEF FILED by defendant E.I. DuPont regarding plaintiff's damages re [49-1] (w/Exhibits 1-6 Attached) (sk)
61	5/24/99	ORDER ON DAMAGES by Judge Jerome Turner . . . For the foregoing reasons, pltf's request for prejudgment and postjudgment interest is granted. The parties shall jointly compute interest to be paid pltf in accordance with the directions of this order and file a joint statement regarding that amount within eleven days of the entry of this order. Pltf's request for punitive damages, liquidated damages, and attorney's fees is denied. . . (cc: all counsel) (sk) [Entry date 05/24/99]
64	6/4/99	ORDER ON PREJUDGMENT INTEREST by Judge Jerome Turner . . . dft's submission is inaccurately calculated because it fails to include principal payments for the period 5/97 through 2/98, and further that it fails to

take into account interest payments on the principal payments missed prior to judgment. The pltf has submitted calculations for most months during the period to the entry of this order and, according to the court's calculations, the interest requested appears to be accurately computed and shall be adopted by the court. Therefore, judgment shall be entered awarding pltf principal benefits in the amount of $57,360.00, plus prejudgment interest of $3,221.68, through $57,360.00, plus prejudgment interest of $3,221.68, through June 3, 1999. . . (cc: all counsel) (sk) [Entry date 06/04/99]

65 6/7/99 JUDGMENT: by Judge Jerome Turner dismissing case. . .It Is Ordered And Adjudged that, in accordance with the Orders docketed 3/30/99 and 6/4/99, Pltf is awarded principal benefits in the amount of $57,360.00, plus prejudgment interest in the amount of $3,221.68, through 6/3/99, for which let execution issue. . .(cc: all counsel) (sk) [Entry date 06/07/99]

Sixth Circuit Docket 98-6317/6319 & 99-5125

5/26/00 OPINION filed: The district court's decision to grant summary judgment to Dupont is REVERSED and remanded for trial, otherwise the judgment of the

district court awarding attorney's fees is AFFIRMED. Plaintiff's motion to strike Pollard's reply brief is denied, decision for publication pursuant to local rule 206 [98-6317, 98-6319, 99-5125]. Gilbert S. Merritt, Authoring Judge, Eric L. Clay, Circuit Judge, Richard D. Cudahy, Circuit Judge. (cb) [98-6317 98-6319 99-5125]

5/26/00 JUDGMENT: AFFIRMED in part REVERSED in part and remanded. (cb) [98-6317 98-6319 99-5125]

6/2/00 PETITION for en banc rehearing filed by Alayne B. Adams and Kathleen L. Caldwell for Appellee Cross-Appellant Sharon B. Pollard. Certificate of service date 6/1/00. [98-6317, 98-6319, 99-5125] (blh) [98-6317 98-6319 99-5125]

6/9/00 BRIEF filed by Geoffrey L. Carter for Amicus Curiae EEOC in support of appellee/cross-appellant's petition for rehearing en banc. Copies 25. Certificate of service date 6/8/00. Number of Pages: 14. [98-6317, 98-6319, 99-5125](blh) [98-6317 98-6319 99-5125]

6/23/00 ADDITIONAL PETITION for en banc rehearing filed by N. Victoria Holladay for Appellant Cross-Appellee E I DuPont. Certificate of service date

	6/22/00. [98-6317, 98-6319, 99-5125] (blh) [98-6317 98-6319 99-5125]
8/25/00	ORDER filed denying petition for en banc rehearing [2175711-1] filed by N. Victoria Holladay and the petition for en banc rehearing [2163619-1] filed by Alayne B. Adams and Kathleen L. Caldwell [98-6317, 98-6319, 99-5125]. Gilbert S. Merritt, Eric L. Clay, Richard D. Cudahy (7th Circuit), Circuit Judges. (blh) [98-6317 98-6319 99-5125]
9/6/00	MANDATE ISSUED with no cost taxed [98-6317, 98-6319, 99-5125] (cb) [98-6317 98-6319 99-5125]
11/20/00	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Cross-Appellant Sharon B. Pollard in 98-6317, Appellee Cross-Appellant Sharon B. Pollard in 98-6319, Appellee Sharon B. Pollard in 99-5125. Filed in the Supreme Court on 11-13-00, Supreme Ct. case number: 00-763. [98-6317, 98-6319, 99-5125] (swh) [98-6317 98-6319 99-5125]
1/12/01	U.S. Supreme Court letter filed granting petition for writ of certiorari [2258859-1] filed by Sharon B. Pollard, Sharon B. Pollard, Sharon B. Pollard [98-6317, 98-6319, 99-5125] in

98-6317, 98-6319, 99-5125. Filed in the Supreme Court on 01-08-01. (swh) [98-6317 98-6319 99-5125]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed January 11, 2001]

No. 95-3010 M1/V

SHARON B. POLLARD and	)
JOHN A. POLLARD,	)
Plaintiffs,	)
	)
v.	)
	)
E.I. DUPONT DE NEMOURS CO.,	)
Defendant.	)
	)

ORDER OF STAY

The Supreme Court of the United States has granted certiorari from the decision of the Court of Appeals for the Sixth Circuit in this matter. Pollard v. E.I. Dupont de Nemours, No. 00-763, 2001 WL 12416 (U.S. Jan 8, 2001). The grant of a writ of certiorari operates as a stay of proceedings in lower courts. United States v. Eisner, 323 F.2d 38, 42 (6th Cir. 1963). Accordingly, the Court STAYS all proceedings in this matter pending the resolution of the appeal to the Supreme Court.

ENTERED this 11 day of January, 2001.

/s/_____
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

[Filed March 30, 1999]

NO.98-2147-TUA

SHARON B. POLLARD, *Plaintiff,*	)
v.	)
E.I. DUPONT DE NEMOURS CO., *Defendant.*	)

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Sharon Pollard filed this action alleging that defendant E.I. DuPont De Nemours, Inc. breached the terms of its Total and Permanent Disability Plan ("the disability plan"), which is a welfare benefit plan as defined by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., in its denial of benefits. Presently before the court are the parties' cross-motions for summary judgment.

I. The Parties' Motions

Although Pollard's complaint is limited to the denial of benefits under DuPont's disability plan, at issue is DuPont's denial of benefits under both its disability plan and

its Pension and Retirement Plan ("the retirement plan").[1] The parties have moved for summary judgment on the denial of benefits under both plans.

A motion for summary judgment is normally an inappropriate vehicle to resolve disputes concerning eligibility for benefits under an ERISA plan. Wilkins v. Baptist Healthcare System, Inc., 150 F.3d 609, 619 (6th Cir. 1998). Instead, a court should conduct a "review based solely upon the administrative record and render findings of fact and conclusions of law accordingly." Id. In so doing, the court's review is limited to the record that was before the administrator, although the court may consider the parties' arguments concerning the proper analysis of the evidentiary

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[1] Pollard originally filed for benefits under both the disability plan and the retirement plan. Defendant issued a single letter denying both claims, and then issued a single letter rejecting Pollard's appeal on both claims. Plaintiff then sued, alleging in her complaint that defendant breached the terms of the disability plan. Normally, the court would limit its focus to the subject matter of plaintiff's complaint. However, on July 30, 1998, defendant filed its motion for summary judgment where it defined the term "plan" in this case as referring to both the disability and the retirement plan. Plaintiff filed her motion for summary judgment several days later, where, similar to the complaint, plaintiff asked for relief under the disability plan, but throughout her memorandum in support of that motion plaintiff addressed and relied on the provisions of both plans. It appears as though plaintiff did not realize these were two distinct plans. Nevertheless, rather than raise any objection in response to plaintiff's motion, defendant's arguments in response revolved largely around the interpretation of provisions within the retirement plan, and defendant again defined "plan" as referring to both plans. Pursuant to Fed. R. Civ. P. 15, the court will treat the complaint as if it alleged an improper denial of benefits under both the disability plan and the retirement plan.

materials contained in that record. An exception to this limitation on the scope of review exists for evidence that "is offered in support of a procedural challenge to the administrator's decision, such as an alleged lack of due process afforded by the administrator or alleged bias on its part." Id. Pursuant to the court's order of September 8, 1998, the court will also consider the affidavits of Steven Harrison and Dr. Benjamin Ramirez, filed by defendant, and Pollard's affidavit to the extent it provides information relating to the administrative or benefits process, but not relative to her medical condition.

Accordingly, the court will render findings of fact and conclusions of law based solely on its review of the administrative record and the specified affidavits, and will treat the parties' motions for summary judgment as motions for judgment. See Franklin v. Gibson, ___ F. Supp.2d ___, 1999 WL 137623, at *1 (M.D. Tenn. March 8, 1999); Marchetti v. Sun Life Assurance Co., 30 F. Supp.2d 1001, 1004 (M.D. Tenn. 1998).

II. Standard of Review

Denials of benefits by ERISA employee benefit plan administrators are "to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan," in which case the denial should be reviewed under an arbitrary and capricious standard. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); Perry v. United Food & Commercial Workers Dist. Unions, 64 F.3d 238, 242 (6th Cir. 1995). It is undisputed that both plans in question give DuPont discretionary authority to determine eligibility for benefits and to construe the terms of the respective plans. Accordingly, the

court will review the administrator's decisions using the arbitrary and capricious standard.

The arbitrary and capricious standard "is the least demanding form of judicial review of administrative action . . . . When it is possible to offer a reasonable explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary and capricious." Perry, 64 F.3d at 242 (internal quotations and citations omitted). The reasonableness of the explanation, however, must be looked at in light of the terms of the plan. See Miller, 925 F.2d at 984 (finding an administrator's determinations are "not arbitrary and capricious if they are rational in light of the plan's provisions"); Callahan v. Rouge Steel Co., 941 F.2d 456, 460 (6th Cir. 1991) (finding that the most important factor to weigh in determining whether the administrator was arbitrary and capricious "is the language of the plan itself as known by the employees, or as the employees should have known.").

The deference paid an administrator's decision can be tempered where an inherent conflict of interest exists. "[I]f a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'factor [ ] in determining whether there is an abuse of discretion.'" Miller v. Metropolitan Life Ins. Co., 925 F.2d 979, 984 (6th Cir. 1991) (quoting Bruch, 489 U.S. at 115). See also Peruzzi v. Summa Medical Plan, 137 F.3d 431, 433 (6th Cir. 1998); Davis v. Kentucky Fin. Cos. Retirement Plan, 887 F.2d 689, 694 (6th Cir. 1989). It is undisputed that the DuPont plans in question are self-funded and self-administered. Accordingly, the court will consider this factor as it reviews the administrator's determinations under the arbitrary and capricious standard.

III. Background

Pollard was employed by DuPont as an Operator at its manufacturing facility in Memphis, Tennessee, from 1977 until her termination on or around February 29, 1996. An Operator is required to do heavy lifting, withstand temperature extremes, use simple hand tools, operate fork lift trucks, operate chemical equipment, turn valves, perform shift work, wear breathing apparatus equipment, climb stairs and work overtime.

While employed by DuPont, Pollard was a participant in both DuPont's Total and Permanent Disability Plan and its Pension and Retirement Plan. Both plans are administered by the Board of Pensions and Benefits. The disability plan provides, in relevant part, that "each employee shall be eligible for benefits under this Plan if he becomes disabled after the date he completes one year of service and his service is terminated because of total and permanent disability on or after the effective date." The disability plan states that an individual will be considered "totally and permanently disabled" if the administrator determines "that [the participant] is totally disabled by injuries or disease and presumably will be totally and permanently prevented from pursuing any gainful occupation." The disability plan reserves the administrator's right to require in support of an application for benefits satisfactory medical evidence of permanent and total disability. What constitutes "satisfactory medical evidence" is to a large extent left to the discretion of the administrator, and it may require "a report from the individual's physician and other appropriate information and documentation as part of the basis for determining total and permanent disability."

The retirement plan provides, in relevant part, that "[a]n employee may be retired by the Company if the [administrator] finds that he has become, for any reason, permanently incapable of performing the duties of his position with the degree of efficiency required by the Company, and he has at least 15 years of service." Although the retirement plan vests discretion in the administrator to determine eligibility for benefits, unlike the disability plan it makes no specific mention of what type of evidence may be required to support a claim of incapability.

On or around July 31, 1995, Pollard took leave from her job on short-term disability. In her complaint, Pollard alleges that her disability arose out of sexual harassment suffered at DuPont. The short-term disability period ended on or about February 29, 1996, but Pollard never returned to work.

On February 27, 1996, Pollard, with the assistance of Robert Shaw, a Human Resources Manager at DuPont, filed a Case Determination Letter that functioned as an application for benefits under both the retirement and disability plans. Attached to that application, and in support of Pollard's claim, were the submissions of Dr. Janet Hill and Dr. F. A. Steinberg.

Pollard was referred to Dr. Hill, a clinical psychologist, sometime around August 1995. Beginning on September 6, 1995, Dr. Hill sent DuPont a series of letters pertaining to Pollard's status. In the September 6, 1995 letter, Dr. Hill diagnoses Pollard as suffering from Post Traumatic Stress Disorder-Acute and opines that Pollard is not currently capable of returning to work because of the severity of her symptoms and a guarded prognosis. According to Dr. Hall, Pollard's return to work "would likely exacerbate

her symptoms due to exposure to external cues representing the trauma she has experienced." In a letter dated November 13, 1995, Dr. Hill writes that Pollard appears to have made some mild improvement in response to medication, but her return to work is still not feasible because such a return would exacerbate her symptoms of anxiety. On December 13, 1995, Dr. Hill again wrote DuPont stating that Pollard appears to continue in her improvement, but that she recommends Pollard continue her leave of absence at least through the end of January 1996. In a letter dated January 29, 1996, Dr. Hill reports that although Pollard's symptoms have not been completely eliminated, she recommends that Pollard return to work on a trial basis. Also in that letter, Dr. Hill explains that she hopes that allowing Pollard to return to work will alleviate some of Pollard's stress and anxiety about job security. On February 26, 1996, Dr. Hill wrote DuPont, to follow up on a message she allegedly left on February 12, 1996, in which she reversed course and reported that as per that earlier message, she does not feel Pollard is capable of returning to work, nor does she feel that Pollard's returning to her previous work environment would be recommended. In a letter dated February 29, 1996, Dr. Hill expands upon the February 26 letter and states as follows:

> I am writing again to confirm Sharon Pollard's disability and to state my opinion that she is unable to return to her former workplace in any capacity. In addition, it is my opinion that Ms. Pollard will be unable to engage in any work, particularly that which involves her coming into contact with people she does not know.
>
> In my opinion, Ms. Pollard's disability is a direct result of trauma she experienced in the

> workplace leading to her diagnosis of Post Traumatic Stress Disorder Chronic (309.81). [Dr. Hill's letter then lists several symptoms of Pollard's ailment].
>
> These symptoms appear to have resulted from Ms. Pollard's fear of physical injury by other co-workers. They have been present for many months, and cause clinically significant impairment, both social and occupational functioning.

In early 1996, DuPont hired Dr. Steinberg, also a clinical psychologist, to, as stated in Dr. Steinberg's report, "determine 1) whether Ms. Pollard has the ability to go back to work without deteriorating, and 2) to assess whether the following series of work related events were responsible for precipitating her present psychological condition." There is no evidence in the record that Dr. Steinberg was made aware of the provisions in the plans requiring total and permanent disability or incapability to return to work at DuPont's standards before benefits could be collected. DuPont required Pollard to submit to psychological evaluation by Dr. Steinberg, and Dr. Steinberg saw Pollard at his office on several occasions in January 1996. On January 29, 1996, Dr. Steinberg submitted a letter to DuPont pertaining to his evaluation of Pollard. In that letter, Dr. Steinberg stated that "[i]t is my opinion that [Pollard] will deteriorate and experience similar psychological problems if she resumes her position. For this reason, I feel that her ability to resume her duties is questionable." Dr. Steinberg based his conclusion on Pollard's own statements while being interviewed, Dr. Steinberg's observations of her during the interview, and psychological testing, that included application of several objective medical tests, such as the Wechsler Adult

Intelligence Scale-Revised (WAIS-R); Minnesota Multiphasic Personality Inventory-2 (MMPI-2); and the Rorschach Inkblot Technique. Dr. Steinberg issued a lengthy and detailed report interpreting his results, which contained a summary of results which are set forth as follows.

> Summary of Psychological Test Results
> The above interpretations concur with indications that the patient is presenting manifestations of an established personality and adjustment style, rather than an acute condition. Her present state of declared disability is not presently interfering with cognitive/intellectual abilities. There are no indications of decline in cognitive/intellectual functioning due to her present psychological manifestations.
>
> This is a tense, anxious and angry individual who feels personal discomfort when significant others fail to treat her as she deems necessary. She is prone to be self centered and narcissistic. She will be highly sensitive to others' failure to treat her consistent with her own narcissistic self concerns. In this sense, others will not live up to her expectations. Perceived interpersonal frustration will foster feelings of self devaluation.
>
> . . . .
>
> There are no indications of clinical depression or Posttraumatic Stress Disorder within the testing. Psychological test data do not indicate that reality testing is impaired. She is highly

suspicious. Poor reality testing results from her interpersonal oversensitivity. She will embellish her perceptions with preconceived interpretations of her environment. She is very stubborn in dealing with social situations. Her passive-aggressive style will be employed as a vehicle for anger expression. This will foster a continuance of her present complaints in response to her presently perceived situation.

Summary

. . . .

Inefficiency and deterioration of psychological functioning has occurred over the past 14 years due to numerous types of stressors. Therefore, her present concerns regarding harassment cannot be considered as a sole precipitating factor in her present condition. Inefficiency and deterioration in psychological functioning should be considered as a function of her adaptive style historically, with relative severity cumulative in nature. If she should return to work, a resurgence of symptom expression would occur. Due to the probability of subsequent deterioration, her return to work is not advised.

Recommendations

. . . .

2. Return to work is not recommended.

On May 23, 1996, DuPont advised Pollard by letter that her claim for benefits under the disability and retirement plans had been denied. The letter stated that "[i]t was determined that you are not permanently incapable of performing the duties of available work with the degree of efficiency required by the Company," as required by the retirement plan. The letter also stated that "[m]edical information considered in the determination indicated that you have mental problems. However, the medical evidence submitted does not support a conclusion that you are permanently incapable of performing the duties of a Manufacturing Assistant with the degree of efficiency required by the Company." The medical evidence relied upon to arrive at this determination consisted of the letters from Dr. Hill, the letter from Dr. Steinberg and the corresponding report, and a Medical Evaluation Report prepared by Kathleen Cook, R.N. This evidence was reviewed by Dr. Benjamin Ramirez, who was the Corporate Associate Medical Director for defendant.[2] Dr. Ramirez never examined Pollard, but found the evidence submitted in support of her claim lacked any objective medical indication that she was permanently incapable of returning to work. Dr. Ramirez recommended that Pollard's claim be denied, and that recommendation was adopted by a representative of the Human Resources Department, Carol L. Killeen, and then by the administrator. The denial letter informs Pollard of her right to appeal to the

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[2] The Medical Evaluation Report prepared by Cook summarizes Pollard's physical characteristics, references the submissions of Drs. Hall and Steinberg, and describes Pollard's past medical history. On that report, Dr. Ramirez states that based on Cook's report and the submissions of Drs. Hill and Steinberg the Medical Division's evaluation is that Pollard is not incapable of pursuing any gainful employment and that she does not require special job consideration.

administrator and states that in order to be successful on appeal she "must provide additional objective evidence that will indicate a total impairment of function. Examples of objective evidence are significant or positive results of testing mental and complete medical evaluations. Opinions of healthcare providers are not sufficient without objective medical evidence to support such opinions."

In response, Pollard advised defendant that she was appealing the administrator's decision and in support of her appeal she submitted letters from Dr. Richard Farmer, a psychiatrist with the UT Medical Group, and Dr. J. Brody, her treating physician. Prior to denying her claim, DuPont had required Pollard to submit to an evaluation by Dr. Farmer,[3] for, as stated in Dr. Farmer's report, "the purpose of determining the level of disability." There is no evidence in the record that Dr. Farmer was made aware of the specific plan provisions in question, or that he should issue a prognosis with those provisions in mind. In a letter to DuPont dated May 3, 1996, Dr. Farmer states, in pertinent part, as follows:

> Diagnostic impression: Post Traumatic Stress Disorder, chronic, with major depression.
>
> The patient may well have some borderline and passive aggressive personality traits and these undoubtedly played a role in her overall discomfort. However, I agree [with Dr. Hill

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[3] Although Dr. Farmer conducted his evaluation prior to the letter of denial being issued, his evaluation was not considered in connection with the original denial.

> and Dr. Steinberg] that she is disabled at this time and requires further psychiatric care. . . . My only suggestion would be that she be more vigorously treated with anti-depressant medication, and that she seek a psychiatrist for this purpose. Post traumatic stress symptoms are treatable and she should be further along in her improvement status at this point than she actually is.

Dr. Brody did not dispute the conclusions of the three other professionals who had actually examined Pollard. In his letter dated June 11, 1996, Dr. Brody states, in part, as follows:

> [Pollard] developed progressive anxiety and sleep disturbance, followed by dysthymic symptomatology. She had to leave her job in order to avoid further psychological impairment.
>
> Ms. Pollard has further been evaluated by several mental health professionals including Janet Hill PhD and Richard Farmer M.D. All of which concluded that psychological injury occurred.
>
> Since the initiation of antidepressant therapy, Ms. Pollard's symptoms have improved, but also part of the treatment has been the escape from the work-place environment which caused her injury. She will require continuation of medical therapy and needs psychotherapy to assist in her recovery.

In considering Pollard's appeal, the administrator reviewed the submissions of Dr. Brody and Dr. Farmer in conjunction with the past submissions of Dr. Steinberg and Dr. Hill. By letter dated February 27, 1997, defendant informed Pollard that "[t]he medical information reviewed indicated that you have had mental problems. However, the Board determined that there is no objective medical evidence that supports a conclusion you were permanently incapable of performing available work at the time of your termination on 2/29/96 and therefore, are not eligible for an Incapability Pension and benefits pursuant to the Total and Permanent Disability Income Plan."

IV. Pollard's Eligibility for Benefits Under the Plans

1. The Retirement Plan

Based on the record, the court finds that the administrator's decision to deny benefits under the incapability provision of the retirement plan was arbitrary and capricious. The incapability provision provides that "[a]n employee may be retired by the Company if the [administrator] finds that he has become, for any reason, permanently incapable of performing the duties of his position with the degree of efficiency required by the Company, and he has at least 15 years of service."[4]

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[4] The court notes that while this provision states that defendant "may" retire an employee who meets the provision's requirements, defendant has not argued that it has discretion as to whether to grant retirement should Pollard show that she meets those requirements.

Pollard has submitted the evaluations of two psychologists (Dr. Hill and Dr. Steinberg), a psychiatrist (Dr. Farmer), and her treating physician (Dr. Brody). The court emphasizes the fact that these were not all professionals of Pollard's choosing; rather, DuPont referred Pollard to Dr. Hill, required Pollard to submit to a psychological examination by Dr. Steinberg, and required her to submit to an evaluation by Dr. Farmer. In her last letter to DuPont, Dr. Hill opined that Pollard was unable to return to her former workplace in any capacity. In his letter, Dr. Steinberg opined that Pollard would deteriorate and experience similar psychological problems if she resumed her position and that her ability to resume her duties was therefore questionable. In his report, based largely on his interpretation of the application of objective medical tests, Dr. Steinberg more strongly stated that "[i]f [Pollard] should return to work, a resurgence of symptom expression would occur. Due to the probability of subsequent deterioration, her return to work is not advised." In his letter, Dr. Farmer agreed with Drs. Hill and Steinberg that Pollard was currently disabled and that she needed psychiatric care. In his letter, Dr. Brody stated that Pollard "had to leave her job in order to avoid further psychological impairment" and that any improvement was due in part to her escape from the DuPont workplace environment.

In denying Pollard's claim, defendant relied largely on the recommendation of Dr. Ramirez, an in-house physician. Dr. Ramirez's recommendation was based entirely on his review of Pollard's submissions. There is no evidence to suggest that Dr. Ramirez examined or ever even met Pollard. There is no evidence that Dr. Ramirez has any experience in dealing with mental disorders. To the contrary, Dr. Ramirez states that his specialty is in occupational medicine, a

specialty concerned with the health and safety of the workplace.

In summary, the record is as follows. Four physicians, three of whom Pollard was either referred to or required to see by defendant, reported that Pollard was unable to return to work at DuPont. Two of these professionals were clinical psychologists, one was a psychiatrist and one was her treating physician. One of the clinical psychologists based his conclusions on the results of objective medical tests. In denying Pollard's claim, the administrator relied on the recommendation of an in-house physician, who practiced primarily in the field of occupational medicine, who never examined or even met Pollard. Relying on the opinion of an in-house physician who was not specialized in the field and who never examined Pollard was arbitrary and capricious in light of the overwhelming evidence concerning Pollard's capacity to return to work. See Donaho v. FMC Corp., 74 F.3d 894, 900-01 (8th Cir. 1996) (finding administrator's reliance on a reviewing physician who never examined participant was an abuse of discretion where the reviewing physician's conclusions were contradicted by the opinions of an examining physician and two treating physicians).

There are other reasons justifying the court's decision. For instance, the court is convinced that the administrator failed to properly interpret the terms of the retirement plan. Initially, the court notes that defendant made one review and issued one letter of denial, but there were two different plans with two different requirements for eligibility. In the letter of denial, defendant wrote that "[i]t was determined that you are not permanently incapable of performing the duties of available work with the degree of efficiency required by the Company," and that "the medical evidence submitted does not support a conclusion that you are permanently incapable of

performing the duties of a Manufacturing Assistant with the degree of efficiency required by the Company." (emphasis added). It is not clear what is meant by these statements. The only relevant inquiry, under the terms of the retirement plan, is whether Pollard was capable of returning to work as an Operator up to the level of efficiency required by DuPont. Perhaps defendant confused the requirements of eligibility under the retirement plan with the requirement under the disability plan that the participant be totally and permanently prevented from pursuing any gainful occupation. Defendant also writes in its letter of denial that in order to succeed on appeal, Pollard "must provide additional objective evidence that will indicate a total impairment of function." If read literally, this would require Pollard's death. If read only as requiring evidence of a total impairment of function as an Operator, such a reading still far exceeds any requirement under the retirement plan. Again, the relevant inquiry should have been whether Pollard was permanently incapable of performing the duties of an Operator with the degree of efficiency required by DuPont. These discrepancies were not resolved in the subsequent letter denying Pollard's appeal, as defendant again wrote "that there is no objective medical evidence that supports a conclusion you were permanently incapable of performing available work." (emphasis added).

Furthermore, the administrator's requirement that Pollard submit objective medical evidence in order to be successful on appeal was not rational under the facts of this case. Defendant's letter of denial listed as examples of acceptable objective evidence "significant or positive results of testing mental and complete medical evaluations." Ignoring the fact that this sentence makes little grammatical sense and requires the reader to make certain assumptions, it provides little direction as to what is actually required. Here, Pollard had already submitted the report of Dr. Hill who had

conducted several interviews with Pollard. Are not interviews a form of mental testing? Why was that not acceptable? If defendant required a more objective form of a test, why were the tests administered by Dr. Steinberg and upon which he based his conclusions insufficient?[5] It must be remembered that it was DuPont that referred Pollard to Dr. Hill and required her to see Dr. Steinberg. Presumably, plaintiff would have been aware of the type of tests that had been done, and these, although in her favor, were found insufficient. DuPont did little to clarify what would be sufficient. Furthermore, several courts have recently questioned an administrator's absolutely requiring objective medical evidence, especially when the language of the plan in question does not explicitly require it or give the administrator explicit authority to ask for

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[5] Although not explained in the letter of denial, in its memorandum in support of its motion for summary judgment defendant points to a portion of Dr. Steinberg's report that indicates Pollard is manifesting symptoms of an established "personality and adjustment style, rather than an acute condition." It is unclear why defendant feels this is relevant. As noted throughout its memorandum in response to Pollard's claims that the cause of her condition was sexual harassment suffered in the workplace, defendant clearly states the cause of her condition is irrelevant under either plan. But for certain exceptions that are not applicable, plaintiff's eligibility for benefits is not dependent on the cause of her incapability to return to work as an Operator or her total and permanent inability to engage in gainful employment. Even if a determination on whether Pollard suffered from psychological problems or just a bad personality was relevant, other portions of the report point away from defendant's position, such as in the summary where Dr. Steinberg indicates that "[i]nefficiency and deterioration of psychological functioning has occurred over the past 14 years due to numerous types of stressors." Whatever the cause, Dr. Steinberg clearly states that Pollard's "return to work is not advised."

it. See Mitchell v. Eastman Kodak Co., 113 F.3d 433, 442-443 (3d Cir. 1997); Durr v. Metropolitan Life Ins. Co., 15 F. Supp.2d 205, 212 (D. Conn. 1998); Palmer v. University Med. Group, 994 F. Supp. 1221, 1233-34 (D. Oreg. 1998). See also Callahan, 941 F.2d at 460 (finding the most important determinant of whether an administrator's decision is arbitrary and capricious is the language of the plan itself as known to the employees or as they should have known it). Although it would not be arbitrary and capricious to require objective medical evidence in disability cases where such evidence is readily available, the court finds that when the illness is psychological and four separate professionals, three of whom were specialists in the area and two of whom were hired by the defendant find that plaintiff is unable to return to work, the requirement of additional objective medical evidence is arbitrary and capricious.

Defendant offers two justifications for the administrator's decision to deny benefits under the retirement plan. First, defendant argues that no objective medical evidence was submitted which showed any impairment of Pollard's cognitive or physical ability to function as an Operator. The court has already noted its concern with the requirement of objective medical evidence in this case, but even if defendant was legally entitled to require objective medical evidence it was only entitled to do so to determine whether provisions of the plan had been met. The plan provision in question focuses only on Pollard's ability to return to work as an Operator up to DuPont's standards. The court reads this as focusing on whether Pollard could return to work as an Operator at DuPont up to DuPont's standards, not on whether she was merely physically and cognitively capable of driving a truck or turning a valve. Even if she was fully functional in the cognitive and physical sense outside of the DuPont environment, such evidence is not relevant in this

case where Pollard is claiming she cannot use those cognitive and physical abilities at DuPont because of her psychological illness.[6] The overwhelming evidence in this case supports a finding that Pollard was not capable of returning to work as an Operator at DuPont.

Defendant's second justification is that Pollard failed to submit any evidence as to the permanency of her condition, as required by the plans. The court begins by noting that "permanent" cannot be defined here as requiring conclusive evidence that Pollard will never recover. Indeed, the court would take with a grain of salt the opinion of any doctor who conclusively stated that any patient, other than those in the most dire of circumstances, could never return to work. At the very least, changes in medical technology and the possibility of a positive response to new and varied treatments make it possible for future improvement. Thus, "permanent disability" should be defined as that which is expected to continue into the reasonable future as opposed to that which is temporary. See Lumbra v. United States, 290 U.S. 551, 560 (1934) (finding permanent disability "means that which is continuing as opposed to what is temporary" in the context

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[6] An example may help to clarify this statement. Assume an employee is severely allergic to a chemical found only in the DuPont workplace environment, such that the employee, who in all other respects is physically and psychologically normal, cannot function as an employee in the DuPont workplace. Should the court find the employee incapable of functioning as an employee up to DuPont standards, or should the court find, as defendant argues in this case, that because the employee is cognitively and physically capable of doing what is actually required by the job she is not disabled? The answer is obvious. The focus should be on whether Pollard can do the job at DuPont, not on whether she can physically and cognitively do the job.

of a war risk insurance policy); Crook v. Prudential Ins. Co., 139 F.2d 335, 339 (6th Cir. 1943) (finding under Kentucky law that the phrase "total and permanent disability" does not mean complete and continuing until death, but instead "imports continuance of the necessary degree of disability for an indefinite period of appreciable duration and not merely a transient or temporary incapacity"); Metropolitan Life Ins. Co. v. Noe, 31 S.W.2d 689, 690 (Tenn. 1930) (defining term "permanent disability" as "lasting or continuous as distinguishable from temporary merely with a promise or affording a probability of recovery"). Defendant focuses on various statements in the doctors' reports pertaining to Pollard's improvement, and argues that her improvement and capacity for continued improvement precludes the possibility that she is permanently disabled. The court disagrees. True, Dr. Brody and Dr. Hill stated that Pollard was showing signs of improvement. Dr. Farmer also indicated that Pollard's condition was treatable and that he would have expected more improvement during her treatment. These statements must be qualified in two respects. First, Dr. Hill changed her evaluation and explicitly stated that Pollard was "unable to return to work in any capacity." Second, the reported improvement appears to be at least in part due to Pollard's removal from the DuPont workplace. Dr. Brody stated that Pollard' s recovery was due in part to her escape from the DuPont workplace. Dr. Steinberg stated that a return to DuPont would bring about a "resurgence of symptom expression." Dr. Hill wrote that Pollard's condition and symptoms were a direct result of a trauma experienced in the workplace and that she would be unable to return to that workplace. Thus, the mere fact that Pollard either improved or was capable of improvement does not support defendant's position.

Defendant also argues that Pollard has failed to produce any objective medical evidence that her condition is permanent. As noted earlier, the rationality of this requirement must be determined in light of the facts of this case. Beyond what the court has already observed as problematic with this requirement, the court makes two additional notations. First, at least with respect to Dr. Steinberg and Dr. Farmer, these doctors were hired by DuPont to evaluate Pollard but were not told they should make a prognosis on her recovery. Thus, the court would not expect to see explicit mention that Pollard would not be able to return to work for the foreseeable future. Second, defendant reads the doctors' reports for what is not there rather than for what is there. For example, Dr. Steinberg states that Pollard's "return to work is not advised" and "is not recommended." Dr. Steinberg does not qualify these statements with "at this time" or "currently." Dr. Hill also writes that Pollard "is unable to return to her former workplace in any capacity." Dr. Hill also does not qualify her statements to reflect a temporary condition. The court need not address the statements of Dr. Brody and Dr. Farmer, but merely notes they also did not qualify their statements.

In summary, the court finds the administrator's denial of benefits under the retirement plan was arbitrary and capricious.

2. The Disability Plan

Based on the record, the court finds that the administrator's decision to deny benefits was rational in light of the disability plan's provisions. The disability plan states that an individual will be considered "totally and permanently disabled" if the administrator determines "that [the participant] is totally disabled by injuries or disease and

presumably will be totally and permanently prevented from pursuing any gainful occupation." (emphasis added).[7]

Without addressing all the evidence that has been previously recited, it is apparent that much of Pollard's illness stems from the DuPont workplace environment. Only Dr. Hill's last letter offers a modicum of support for the proposition that Pollard cannot maintain any gainful employment. Even there, Dr. Hill qualifies her statement as follows: "[i]n addition, it is my opinion that Ms. Pollard will be unable to engage in any work, particularly that which involves her coming into contact with people she does not know." Without offering examples, the court notes that there are several areas of work that would not require Pollard to come into contact with strangers.

In summary, although there is overwhelming evidence in the record that Pollard could not return to work at DuPont, there is little evidence in the record to suggest Pollard could not work elsewhere. Thus, the administrator's decision to deny benefits under the disability plan was not arbitrary and capricious.

V. Conclusion

For the foregoing reasons, both plaintiff's and defendant's motions for summary judgment will be treated as motions for judgment.

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[7] The court also notes that unlike the retirement plan, the disability plan explicitly gives the administrator great discretion in what constitutes acceptable medical evidence of disability.

Plaintiff's motion is denied with respect to her assertion that defendant's denial of benefits under the disability plan was arbitrary and capricious, but is granted with respect to her assertion that defendant's denial of benefits under the retirement plan was arbitrary and capricious. Correspondingly, defendant's motion is granted with respect to its assertion that its denial of benefits under the disability plan was not arbitrary and capricious, but is denied with respect to its assertion that defendant's denial of benefits under the retirement plan was not arbitrary and capricious.

The parties shall have ten days from the entry of this order to file briefs regarding what damages plaintiff is entitled to.

IT IS SO ORDERED this 30th day of March, 1999.

/s/_____
JEROME TURNER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed May 24, 1999]

NO. 98-2147-TUA

SHARON B. POLLARD, *Plaintiff,*	)
v.	)
E.I. DUPONT DE NEMOURS CO., *Defendant.*	)

ORDER ON DAMAGES

In an order dated March 30, 1999, the court found defendant, E.I. DuPont De Nemours, Inc., liable to plaintiff, Sharon Pollard, for defendant's improper denial of benefits under an ERISA retirement plan.[1] Pursuant to that order, the court directed the parties to brief what damages plaintiff was entitled to.

The parties agree that under the terms of the plan at issue, plaintiff is entitled to a monthly incapability retirement

[1] Defendant originally denied benefits under both a disability and a retirement plan. The court upheld the denial of benefits under the disability plan, but found the denial of benefits under the retirement plan was arbitrary and capricious.

payment of $1,063.00, a monthly incapability supplement payment of $371.00; and a lump sum incapability retirement payment of $55,926.00 that represents monthly payments not made beginning with the date of eligibility through the court's March 30, 1999 order. The parties also agree that plaintiff is entitled to life, dental, and medical insurance benefits for life, and retroactive benefits for her out-of-pocket expenses that should have been covered beginning with her eligibility under the plan. The court sees no reason to disturb the parties' agreement with respect to the benefits plaintiff is entitled to under the plan. Accordingly, the court adopts the parties' agreement.

The parties do dispute whether plaintiff is entitled to several other types of damages, each of which is discussed below.

I. Prejudgment Interest

"Generally, the beneficiaries of pension plans have a right to prejudgment interest on benefits wrongly withheld." Wells v. U.S. Steel, 76 F.3d 731, 737 (6th Cir. 1996).

> Even assuming arguendo that the Trustee was acting prudently in withholding the pension funds . . . , it cannot be said that this did not confer a benefit on the trustee. Any additional time one gains, rightfully or wrongfully, in not having to submit payment of a sum of money owed another is without doubt a benefit. Moreover, the payee, plaintiff-appellant herein, has been deprived of the benefit of those payments. . . . To allow the Fund to retain the interest it earned on funds wrongfully withheld from a beneficiary would

> be to approve of an unjust enrichment. Further, the relief granted would fall short of making the beneficiary whole because he has been denied the use of money which was his.

Sweet v. Consolidated Aluminum Corp., 913 F.2d 268, 270 (6th Cir. 1990) (internal quotations and citation omitted). See also Tiemeyer v. Community Mut. Ins. Co., 8 F.3d 1094, 1102-03 (6th Cir. 1993). Although the trial court has discretion in awarding prejudgment interest, a trial court that exercises its discretion in favor of the fiduciary or trustee must enunciate why it chose that course in light of the general policy favoring the award of prejudgment interest. Id.

Defendant argues that an award of prejudgment interest is only appropriate when the trustee or fiduciary unduly delays the benefits a participant is entitled to. In light of the above-cited precedent, defendant's position is incorrect. See, e.g., Sweet, 8 F.3d at 1102 ("Awards of prejudgment interest are compensatory, not punitive, and a finding of wrongdoing by the defendant is not a prerequisite to such an award.") (quoting Drennan v. General Motors Corp., 977 F.2d 246, 253 (6th Cir. 1992)). Except as noted below, the court is aware of no reason, in light of the general policy favoring the award of prejudgment interest, why interest should not be awarded in this matter. Accordingly, the court awards plaintiff prejudgment interest.

The court finds that in order to make plaintiff whole, prejudgment interest should be calculated from the date plaintiff was paid benefits to which she was entitled. Snow v. Aetna Ins. Co., 998 F. Supp. 852, 855 (W.D. Tenn. 1998). Thus, interest should be calculated on each missed monthly payment from the date plaintiff would have received each monthly payment but for defendants's erroneous denial of

benefits. It appears that but for the denial of benefits, plaintiff would have received her first monthly payment on March 1, 1996. Thus, interest shall begin to run on that missed payment beginning March 1, 1996. Interest shall continue to run on that missed payment and on subsequent missed payments from the date of those missed payments until two months after plaintiff's administrative appeal was denied. The court finds that two months is a fair amount of time for plaintiff to have filed her civil suit. Any delay in filing suit after two months was the cause of plaintiff's lost interest until she actually filed her suit. At that point, interest will no longer accumulate on any benefits not paid until plaintiff filed suit. To illustrate, it appears that plaintiff's administrative appeal was denied on February 27, 1997, but that she did not file suit until February 18, 1998. Plaintiff should be entitled to interest on all monthly payments missed prior to April 27, 1997, calculated as stated above, through April 27, 1997. At that point defendant should no longer be charged for plaintiff's delay in filing suit. Interest shall again begin to accumulate on February 18, 1998, the date plaintiff filed suit.

Pursuant to its discretionary authority to set an appropriate interest rate, see Ford v. Uniroyal Pension Plan, 154 F.3d 613, 618-19 (6th Cir. 1998), the court sets a static rate at the last average fifty-two week United States Treasury bill rate published before defendant's initial denial of benefits. See id.

II. Postjudgment Interest

Although ERISA does not specifically address postjudgment interest, it does state that the Act is not intended to invalidate or supersede other federal law. 29 U.S.C. § 1144 (d). Thus, this court must award postjudgment interest pursuant to 28 U.S.C. § 1961, which provides that

"[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." See Quesinberry v. Life Ins. Co. of N. Am., 987 F.2d 1017, 1031 (4th Cir. 1993) (finding award of postjudgment interest in ERISA case is mandatory). Accordingly, the court awards plaintiff postjudgment interest calculated in accordance with the framework of 28 U.S.C. § 1961. Postjudgment interest shall be calculated on the sum of the original award plus prejudgment interest. See Quesinberry, 987 F.2d at 1031-32.

III. Liquidated Damages

Plaintiff claims she is entitled to liquidated damages in the amount of twenty percent of unpaid contributions. It is unclear what unpaid contributions plaintiff is referring to. Plaintiff assets that such an award is mandatory under 29 U.S.C. § 1129 (b) (2), but that section does not pertain to either liquidated damages or unpaid contributions. It appears as though plaintiff may have confused 29 U.S.C. § 1129(b) (2) with 29 U.S.C. § 1129 (g) (2). Section 1129 (g) (2) provides for liquidated damages and unpaid contributions in a successful ERISA action brought by a fiduciary on behalf of an ERISA plan to enforce 29 U.S.C. § 1145, which deals with employers' obligations to make contributions to multiemployer plans. This is not such an action, and 29 U.S.C. § 1129 (g) (2) is unavailable to plaintiff. Accordingly, plaintiff's claim for liquidated damages is denied.

IV. Punitive Damages

It is unclear from plaintiff's complaint on which subsection of 29 U.S.C. §1132 she based her original claim. Nevertheless, the only subsections available to a participant seeking unpaid benefits under an ERISA plan are § 1132 (a)

(1) (B) or § 1132 (a) (3).[2] Punitive damages are not available to a plaintiff seeking relief under either subsection. Ford, 154 F.3d at 617-18. Accordingly, plaintiff's claim for punitive damages is denied.

V. Attorney's Fees

In determining whether attorneys' fees should be awarded in an ERISA benefits suit, a district court should consider:

> (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4)

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[2] 29 U.S.C. § 1132 (a) provides, in relevant part, as follows.

A civil action may be brought --

(1) by a participant or beneficiary --

. . . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

. . . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

> whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

Wells, 76 F.3d at 736 (quoting Sec. of Dept. of Labor v. King, 775 F.2d 666, 669 (6th Cir. 1985)). Applying this framework, the court finds plaintiff is not entitled to attorney's fees.

As to the first factor, there is no evidence to suggest defendant denied plaintiff benefits in bad faith. To the contrary, defendant submitted the affidavit of Steven Harrison, the Director of defendant's Corporate Compensation and Benefits Department and a member of the Board of Benefits and Pensions, who testified that defendant's denial of plaintiff's benefits was in accordance with defendant's long-standing interpretation of the plan. Defendant also submitted the affidavit of Benjamin Ramirez, the Board's medical delegate, who testified that defendant's decision was made on a good faith interpretation of the plan's provisions. Moreover, no evidence has been submitted to suggest that plaintiff was treated differently than any other claimant under the plan. Furthermore, the court notes that plaintiff brought suit challenging defendant's denial of benefits under two plans, and this court found only the denial of benefits under one of those plans to be arbitrary and capricious. In short, this factor weighs heavily in defendant's favor.

Defendant concedes that the second factor weighs in favor of plaintiff. However, this factor is not dispositive.

Foltice v. Guardsmen Products, Inc., 98 F.3d 933, 937 (6th Cir. 1996).

As noted by the Sixth Circuit, the third factor is more likely to weigh in plaintiff's favor when the defendant is highly culpable. Id. The court finds that defendant's decision to deny benefits in this case was most likely the product of an innocent procedural mistake. More specifically, it appears that defendant attempted to apply one standard for granting benefits under two different plans when those two plans set forth different eligibility criteria. This factor weighs in defendant's favor.

Plaintiff concedes that the fourth factor does not weigh in her favor.

The fifth factor is closer than the other four. Defendant's decision to deny benefits was based on plaintiff's failure to provide objective medical evidence of her inability to return to work. The court found this requirement was arbitrary and capricious because defendant's chosen medical consultants had stated that plaintiff could not return to work, even if they had not given explicit objective medical reasons to support their conclusions. Moreover, defendant was less than clear in what it required from plaintiff for eligibility, since at least one of defendant's chosen professionals had relied on objective medical evidence in determining plaintiff could not return to work. Nevertheless, as noted by the court in the earlier order, an administrator's requiring objective medical evidence of a condition is normally not arbitrary and capricious. Defendant was not out of bounds in arguing that its requiring objective medical evidence was not arbitrary and capricious here. Moreover, the court again notes that defendant successfully defended its decision under the

disability plan. In short, this factor does not favor either party to any great extent.

In summary, the first, third and fourth factors favor defendant. Only the second factor favors plaintiff, and that factor is never dispositive. Accordingly, plaintiff's request for attorney's fees is denied.

VI. Conclusion

For the foregoing reasons, plaintiff's request for prejudgment and postjudgment interest is granted. The parties shall jointly compute interest to be paid plaintiff in accordance with the directions in this order and file a joint statement regarding that amount within eleven days of the entry of this order.

Plaintiff's request for punitive damages, liquidated damages, and attorney's fees is denied.[3]

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[3] In a footnote, defendant argues it is inconsistent to award plaintiff pension benefits here when in her sexual harassment suit plaintiff was awarded damages based, at least in part, on her lost earnings capacity. The court notes that it does appear anomalous that plaintiff should receive both compensation for lost salary in her civil award and pension payments, as pensions are generally thought of as providing compensation in lieu of salary. However, without addressing the merits of defendant's argument or the appropriateness of defendant's first raising it at this stage of this proceeding, the court notes that the Sixth Circuit appears to have found this result reconcilable. See Hamlin v. Charter Township of Flint, 165 F.3d 426, 433-35 (6th Cir. 1999) (reconciling plaintiff's receipt of both pension payments and award under Title VII). The court need not rule on defendant's argument, however, because plaintiff's civil award in the sexual harassment case is currently on

IT IS SO ORDERED this 21st day of May, 1999.

/s/_____
JEROME TURNER
UNITED STATES DISTRICT JUDGE

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appeal to the Sixth Circuit. Whether plaintiff will ultimately receive an award for lost earning capacity, therefore, remains to be seen.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed August 20, 1998]

No. 95-3010 M1/V

SHARON B. POLLARD,
Plaintiff,

v.

E.I. DUPONT DE NEMOURS, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff, Sharon Pollard, brought this suit against her former employer, alleging that she had been subjected to a hostile work environment because of her gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). A non-jury trial was held in this matter on October 14, 15, 16, and 24, and November 3 and 4 of 1997. For the reasons set forth below, the Court finds that plaintiff was subjected to a hostile work environment because of her gender, in violation of Title VII, and judgment is ENTERED in favor of plaintiff.

FINDINGS OF FACT

Plaintiff began her employment with defendant in 1977 as a utility worker in the utility pool. She was promoted to

the position of assistant operator ("AO") in the oxone flouride area in 1978, and transferred to an AO position in the hydrogen peroxide area in 1979. In 1987, plaintiff was promoted to the position of operator in the hydrogen peroxide area. While plaintiff was working as an operator in peroxide, only one other woman was in an operator position in that area, and only two of the assistant operators were female. All of the other operators and assistant operators in the peroxide area were male.[1]

Plaintiff initially worked as an operator on "C" shift from 1987 to 1992. Each shift has three operators: the control room operator (or operator #1), operator #2, and operator #3. Each operator has separate duties on the shift, and none of the operators is superior in rank to the others. The control room operator works in the control room, the #2 operator works the south side of the area, and the #3 operator works in the laboratory and in the water building. The three AOs that are assigned to each shift take direction from the operators. While plaintiff was working as the control room operator on "C" shift, an incident occurred during which an AO, Rory Bricco, refused to take direction from plaintiff. Mr. Bricco informed plaintiff that he could not take direction from a woman, and placed a Bible on her desk, opened to a passage which read, "I do not permit a woman to teach or

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[1] Based on testimony at trial, the Court concludes that there are four different shifts ("A", "B", "C", and "D"), with approximately seven people on each shift. See Testimony of Mark Cobb ("Cobb's Test."), Trial Transcript ("Tr.") at 240. Accordingly, of the approximately twenty-eight employees on shifts in the peroxide area, only four were women.

have authority over a man. She must be silent."[2] Plaintiff subsequently transferred to a #2 operator position on "A" shift in 1992.

In 1994, plaintiff had moved from the #2 operator position to the #3 operator position on "A" shift in the peroxide area. The other members of her shift were Steve Carney, Jerry Lee, Joey Moody, David Walker, and Mark Cobb. Carney was the control room operator, Lee was the #2 operator, and Cobb, Moody, and Walker were the three AOs on the shift. The shift supervisor at that time was David Swartz.

During 1992 and 1993, plaintiff and all of the other members of "A" shift got along well. Many of the witnesses testified that they viewed the shift as their "extended family." Members of the shift would cook and eat their meals together

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[2] The Court notes that this event occurred outside of the relevant time period in this case, which is from December 1994 to December 1995, and thus cannot form a basis for liability on the part of defendant. Because allegations involving this same Bible verse are properly before the Court, however, this event is included as context, as the Court finds that the fact that plaintiff had been previously exposed to this Bible verse while working in the peroxide area contributed to the intensity of her reaction when she saw it for the second time.

in the break room,[3] and would talk to each other regularly about their lives outside of work.

In February of 1994, however, the congenial atmosphere on "A" shift began to change. At that time, DuPont announced that it would be taking part, for the first time, in the nationally recognized "Take Your Daughters to Work Day" ("TYDTWD") in April of that year. Plaintiff, as one of two female operators in the entire peroxide area, was asked to give a talk about her job to some of the girls coming to visit the plant on that day, and she agreed to do so. A number of the men on "A" shift, particularly Steve Carney and Jerry Lee, were against TYDTWD, and made their displeasure with DuPont's decision to take part in this event widely known. A number of other men in peroxide, and throughout the plant, were against DuPont's participation as well. See Testimony of Jerry Lee ("Lee's Test."), Tr. at 495. One of these men, Paul Lucas, sent an email out to everyone in the plant regarding TYDTWD, referring to the event as "horse malarky."

Plaintiff had discussions with both Steve Carney and Jerry Lee regarding her participation in TYDTWD, and both men made clear that they were against it. Testimony of Sharon Pollard ("Pollard's Test."), Tr. at 627-28. Subsequent to those discussions, the atmosphere on the shift

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[3] There were three separate eight hour shifts in the peroxide area: the 8:00 a.m. to 4:00 p.m. shift, the 4:00 p.m. to 12:00 midnight shift, and the 12:00 midnight to 8:00 a.m. shift. The employee break room included a small kitchen area with a stove, refrigerator, and microwave, and, particularly on the evening and midnight shifts, members of "A" shift would divide up cooking duties and take turns bringing in food to allow them to eat together.

began to change. All of the men on the shift, with the exception of Mark Cobb, stopped eating with plaintiff and stopped talking to her. Cobb testified that Carney instructed the other men on the shift not to eat with plaintiff, not to share food with her, not to be in the break room with her, and not to talk to her. Cobb's Test. at 251, 273. Plaintiff testified as follows:

> [I]f I came into the lunchroom, nobody would sit down at the table with me. If I sat down at a table that someone was already sitting at, they would get up and leave. . . . I heard a lot of under your breath kind of things . . . and snickering.

Pollard's Test., Tr. at 37. Cobb further stated that Carney instructed the other men on "A" shift not to follow any of plaintiff's instructions without checking with him first. Cobb's Test. at 251-52. Carney himself conceded that "[i]t's a possibility" that he told AOs on "A" shift to disregard plaintiff's instructions. Id. at 904.

It was common knowledge among the employees in the peroxide area that Steve Carney, Jerry Lee, Rory Bricco, and many of the other men in the area, did not approve of women working in peroxide. Cobb's Test., Tr. at 246-47, 251, 359, 361; Testimony of David Walker ("Walker's Test."), Tr. at 746-47. Mark Cobb testified that Carney would make comments to this effect approximately five times per week to the men on "A" shift, and Cobb and several other witnesses confirmed that Carney routinely referred to women as "bitches" and "cunts." Cobb's Test., Tr. at 264, 266; Lee's Test., Tr. at 491-92; Walker's Test., Tr. at 751-52.

Several witnesses testified that they had heard Carney use the word "heifer" to refer to women, and that use of the term "heifer" to refer to women in general was commonplace in the peroxide area. Testimony of Joey Moody ("Moody's Test."), Tr. at 697; Lee's Test., Tr. at 489-90; Walker's Test., Tr. at 723. Carney admitted that he referred to women as "heifers," and that he referred to plaintiff as a "bitch" and a "split tail." Testimony of Steve Carney ("Carney's Test."), Tr. at 908-09. In addition, DuPont had a company-sponsored support group known as the Women's Network,[4] of which Carney routinely expressed his disapproval. Cobb's Test., Tr. at 246-47; see also Testimony of Kay Jenks ("Jenks' Test."), Tr. at 416 (noting that the men on plaintiff's shift did not approve of plaintiff attending the meetings of the Women's Network).

In May of 1994, after plaintiff had been experiencing the kind of isolation described above from the members of "A" shift for approximately two months, the shift supervisor, David Swartz, held a training meeting.[5] During the meeting, all of the members of "A" shift and Swartz were seated around a small conference table. At some point during a break in the meeting, Carney and Walker were having a discussion about a girls softball team, during which Carney said "that heifer can't coach," in reference to the woman who coached the team. Moody's Test., Tr. at 697. Carney also said something along the lines of "women have no business coaching." Moody's Test., Tr. at 677-78; Walker's Test.,

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[4] Plaintiff regularly attended meetings of the Women's Network.

[5] This training meeting was not held to address the problems on the shift, rather it was a training session on work-related matters that was regularly held on Tuesdays.

Tr. at 753; Lee's Test., Tr. at 472-73; Pollard's Test., Tr, at 632. Plaintiff, who was sitting across the table from Carney, heard these comments, became very upset, and asked to be excused to go to the nurse's station. Pollard's Test., Tr. at 632-34.

Once she arrived at the nurse's station, plaintiff asked the nurse to call her supervisor, David Swartz, to come and speak with her. When Swartz arrived, plaintiff was very upset and began to cry. Swartz testified that she told him "that she couldn't take it any more, she was tired of people talking about women the way they do . . . [that Steve Carney had said] 'Well, that heifer can't coach,' . . . and she was just tired of them saying that women can't do anything." Testimony of David Swartz ("Swartz's Test."), Tr. at 949-50. Swartz further testified that he understood plaintiff's words to mean that "she couldn't take it any more about [the] men [in peroxide] degrading women." Id. at 979-80.

Swartz testified that he spoke with his supervisor, Alan Hubbell, about this incident, and that they decided that Swartz should speak to the men on the shift individually. Swartz's Test., Tr. at 952. With the exception of Walker, however, none of the men on the shift remembered Swartz speaking to them about this incident. Carney testified that Swartz spoke to him "a few times" about not communicating with plaintiff "right after [they] quit talking," but that Swartz soon gave up on trying to talk to him about it "because he knows I'm hardheaded . . . [and there] wasn't no sense [sic] in saying anything else." Carney's Test., Tr. at 883-84.

Swartz testified that he could tell "there was tension on the shift" beginning in the spring of 1994, and that things did not improve during the rest of the year. Swartz's Test., Tr. at 954-55. He testified that many of the men talked to him

about the tension on the shift, and that plaintiff complained to him about the lack of communication and isolation on several occasions. Id. at 954, 956. When asked by counsel for DuPont what he, as the shift supervisor, tried to do to address the situation between spring of 1994 and December of 1994, Swartz responded:

> Well, I mean we continually talked to each individual. . . . I worked personally talking to each one of them hopefully [sic] that we could get back together, you know, as a more friendly group where it would relieve the tension, but it didn't seem to work.

Id. at 955.

During the spring and summer of 1994, plaintiff's situation worsened. The men on the shift still refused to eat with her or speak with her. She testified, and Mark Cobb corroborated, that on several occasions Carney would set off false alarms in her area, causing her to run around the peroxide area in search of a non-existent problem.[6] Pollard's Test., Tr. at 38; Cobb's Test., Tr. at 266-69. Cobb testified that Carney would brag to the other men on "A" shift about making plaintiff run all over plant to "show [] that he's in control." Cobb's Test., Tr. at 269. Cobb further testified that on two separate occasions after a false alarm had been pulled while plaintiff was cooking her dinner, one of the men would turn up the stove under her food, burning her dinner and rendering it inedible. Id. at 270-71. Cobb also stated that on several occasions, Carney would not call out actual

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[6] Several witnesses testified that the peroxide area was the size of three city blocks.

alarms from plaintiff's area.[7] Id. at 275. As a result, plaintiff would not respond to the problem, and it would appear to the #3 operator on the next shift that she was not doing her job. Id. at 275.

Part of plaintiff's job as the #3 operator was to monitor the vaporizers in the peroxide tanks, determine when they should be moved, and instruct the AOs to move them according to this schedule. Pollard's Test., Tr. at 32-33; Moody's Test., Tr. at 687. Plaintiff testified that, on several occasions, Carney told one of the AOs on "A" shift to remove the vaporizer from the tank earlier than plaintiff had planned for it to be removed, and then instructed them not to tell her that they had done so. Pollard's Test., Tr. at 32-33, 35. Plaintiff needed to sample the peroxide one hour after the vaporizer was removed. Id. at 90; Moody's Test. at 710. Accordingly, if the vaporizer was removed early, and plaintiff was not informed that it was removed, the resulting product could be too weak.[8] The fact that the peroxide was not timely

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[7] Based on the testimony during the trial, it appears that the control room operator sits in the control room of the peroxide area and monitors a series of instrument panels. If there is a problem, the control room operator will become aware of it via these instruments. The control room operator is then supposed to call out an alarm over the intercom system to the operator or AO working in the relevant area, so that the appropriate individual can go check on the problem.

[8] Various percentage strengths of peroxide were made at DuPont. Plaintiff testified that if a tank was off even 2%, e.g., a tank that was supposed to be 70% strength was 68% instead, it could not be brought back up to the proper percentage because the volume of chemicals that would have to be added would not fit into the already full tank. Pollard's Test., Tr. at 102-03.

sampled also created more work for the #3 operator on the next shift, and made it appear that plaintiff was not doing her job. Id. at 94-95. In addition, removing the vaporizer early could mean that not enough peroxide was made for the shipment out to DuPont's customers the next day, again making it appear as if plaintiff was not competently executing her job duties. Id. 89-90.

Plaintiff testified that the vaporizers were removed early approximately seven times during 1994 and 1995, with the most recent incident occurring during the week of July 5-11, 1995. After the first time that the problems with the vaporizers occurred, plaintiff spoke with David Walker and Joey Moody about it and asked them not to do it again. Id. at 98. Moody told her that he was following Carney's instructions. Id. Carney himself testified that he would sometimes tell one of the AOs to move a vaporizer, and that when he did so he did not believe that he had an obligation to tell plaintiff. Carney's Test., Tr. at 895.

Plaintiff testified that she spoke to her supervisor, David Swartz, about the vaporizer problem the second time it occurred, and every time after that. Swartz admitted that he spoke with plaintiff on several occasions during the spring and summer of 1994, and that she complained to him that "she wasn't getting communication – that Steve wasn't calling out alarms or he wouldn't say stuff to her when [vaporizers] were pulled or whatever because she had responsibility [for] sampling those tanks." Swartz's Test., Tr. at 957. Swartz testified that his only response to these complaints was the following:

> I [Swartz] would go to Steve and say "Steve, that's part of your job, you got to call out alarms." His response was, "I'm calling out

> the alarms, she's not answering it." So I was hearing it from both sides. And I would tell Sharon, "Steve's saying you're not responding to it." And she would say that she was, and so we had to get that communication link straightened out, and I thought that eventually that worked out. . . .

Id. 957. The evidence in the record, however, demonstrates that the problem was not solved, and that Swartz never investigated plaintiff's complaints further.

During the summer of 1994, plaintiff came to work one day and found that both of the tires on her bicycle had been slit open.[9] Swartz admitted that the day that plaintiff discovered that the tires had been cut, she reported it to him and told him that she suspected that Carney was responsible. Swartz's Test., Tr. at 959. In response to this complaint, Swartz spoke with Carney, and Carney denied cutting plaintiff's tires. Id. Again, after Carney denied the allegations, Swartz did nothing else to investigate plaintiff's complaints. Swartz stated, "I didn't have any other facts to go on that would say that he did it." Id. 959-60. Accordingly, rather than investigate further, Swartz did nothing.

In December of 1994, after these problems had been occurring for ten months with no improvement, Mark Cobb and David Walker approached David Swartz and asked him

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[9] Because the DuPont plant is so large, employees often ride bicycles from the front gate to their area.

to call a meeting with the entire shift to discuss the situation.[10] Accordingly, a meeting was held in late December of 1994 that came to be known as the "first healing meeting." On the date that the meeting was to be held, Carney was on vacation. The members of the shift discussed whether or not they should proceed with the meeting without him, and decided to go ahead.

At this meeting, Walker and Moody told plaintiff that Carney had encouraged them not to talk to her. Pollard's Test., Tr. at 46. Walker and Moody also told plaintiff that Carney had told them that she was "keeping a book on them" in which she wrote down everything they said to use it against them. Id. Plaintiff assured them that she was not keeping a book, and then explained to them how stressful the isolation was for her, and how she "had to run around and do more steps than [she] would normally do to get [her] job done . . . because [she] wasn't getting communicated with." Id. at 47. Plaintiff also explained to them that the lack of communication was dangerous because a spill or explosion could result, and that it could also cause a shipment to a customer to be missed. Id. at 51. David Swartz was present throughout this meeting and, again, heard all of plaintiff's complaints.

When Carney returned from vacation and learned that "A" shift had held a meeting without him he was furious, and demanded that another meeting be held. Pollard's Test., Tr. at 51; Cobb's Test., Tr. 285-86; Moody's Test., Tr. at 684; Swartz's Test., Tr. at 961. During the second meeting, the

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[10] The Court notes that even after all of the complaints that Swartz had received during the past ten months from plaintiff, the idea to call a meeting to discuss the situation was not his.

entire shift, including Swartz, was present. Plaintiff reiterated all of her concerns about the lack of communication and other problems. Plaintiff also mentioned that her bike tires had been slashed, and another incident that summer in which she believed that Carney had tried to run her off the road in his truck as she left the DuPont plant.[11] Moody's Test., Tr. at 685; Walker's Test., Tr. at 738. At the second meeting, Carney "got in [plaintiff's] face" and said "Nobody in this area likes you, you're here all alone, it's all your own fault." Pollard's Test., Tr. at 52; Moody's Test., Tr. at 684-85; Cobb's Test., Tr. at 289-90. Plaintiff then turned to Swartz, who was observing this interaction, and asked him if he was going to permit Carney to speak to her in that manner. Cobb's Test., Tr. at 290-91; Pollard's Test., Tr. at 52; Swartz's Test., Tr. at 993. Swartz then said "I think that's enough," and the meeting ended with no further resolution of the issues. Id.

Subsequent to these meetings, the situation did not improve. Swartz was aware that the hostility and tension on the shift had not abated, and plaintiff continued to complain to him that the environment was intolerable for her. Swartz's Test. at 964. Swartz, however, took no action to help her. During this time period, plaintiff attended several meetings of the Women's Network and spoke to the group about the problems she was facing, the isolation she was experiencing, and the psychological effect it was having on her. Jenks' Test., Tr. at 415-17. Kay Jenks, a female engineer and one of the leaders of the Woman's Network, testified that during the Network meetings plaintiff:

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[11] Swartz concedes that he never did anything to investigate plaintiff's allegation that Carney tried to run her off the road. Swartz's Test., Tr. at 1004.

> was concerned that she would be out there on nights, frequently the only woman on shift, she would go for hours without even hearing another voice. . . . She was concerned that something would happen that would endanger her and they would not tell her, they would not get ahold of her, she was also concerned that maybe something would go wrong in the process that she could help fix or impact, but they wouldn't let her know in time and then it would reflect poorly on her performance.

Id. at 417.

In attendance at some of these meetings was Beth Basham, unit supervisor for the peroxide area.[12] Basham conceded that she heard plaintiff talk about the problems she was having with the men in peroxide on several occasions. Basham's Test., Tr. at 1184, 1194-95. Basham further testified that she "knew there was a real problem in the peroxide area of the male workers accepting the role of a female in that area," and that she "was of the firm belief that plaintiff had been harassed on account of her sex in the peroxide area." Id. at 1195, 1217. In spite of this knowledge, however, Basham never investigated the situation based on what she had learned at the Women's Network

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[12] Basham was the supervisor of Alan Hubbell, who was David Swartz's supervisor. Basham was the "number one person in the peroxide area," and reported directly to the plant manager, Gary Lewis. Testimony of Beth Basham ("Basham's Test."), Tr. at 1181-82.

meetings.[13] Basham testified that she never wrote a report or sent a memorandum to anyone in upper management at DuPont stating that there was a real problem in the peroxide area regarding the treatment of female employees, and she "could not recall" if she ever discussed the situation with anyone at DuPont's headquarters informally. Id. at 1197-98.

On May 25, 1995, the Women's Network hosted a meeting at which Bernie Scales, a specialist in diversity training from DuPont's headquarters, spoke to the Network. At that meeting, plaintiff began to talk about the isolation and harassment she was receiving from the men in peroxide, and asked to speak to Scales further at the conclusion of the meeting. After the meeting was over, Scales met with plaintiff. At that meeting plaintiff told Scales all about the long-term harassment and isolation she had been experiencing. As a result of that meeting, Scales spoke to the plant manager Gary Lewis, who then spoke to Bob Shaw, employee relations manager for the Memphis DuPont plant.

On May 28, 1995, Shaw, Lee Ann Rice,[14] and Gary Fish[15] met with plaintiff to discuss her situation. During the course of that meeting, plaintiff recounted the full history of the harassment she had experienced in the peroxide area,

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[13] Basham did become involved in the investigation that took place during the summer of 1995, but, prior to that, did nothing to formally investigate plaintiff's charges of harassment, despite learning of them in the context of the Women's Network meetings.

[14] Rice is a manager in Human Resources. Her supervisor is Bob Shaw.

[15] Fish was a plant shift supervisor.

including the allegation that Carney had tried to run her off the road the previous summer, and told them that she wanted this situation corrected. Testimony of Bob Shaw ("Shaw's Test."), Tr. at 1094; Testimony of Lee Ann Rice ("Rice's Test."), Tr. at 401; Pollard's Test., Tr. at 62. Subsequent to that meeting, Shaw and Swartz spoke to Carney about his behavior. Swartz's Test., Tr. at 968. Carney never received a formal written reprimand, was never suspended from his job, and was never transferred to another shift, demoted, or terminated. Basham's Test., Tr. at 1223; Carney's Test., Tr. at 903-04. In addition, neither Shaw, nor anyone else at Dupont, ever investigated plaintiff's allegation that Carney had tried to run her off the road, after Shaw spoke to Carney and Carney denied that it had occurred. Shaw's Test., Tr. at 1102. Even after Bernie Scales returned to Wilmington with knowledge of plaintiff's concerns, no one from DuPont headquarters ever came to the Memphis plant to investigate plaintiff's allegations. Basham's Test., Tr. at 1250-51.

After Shaw spoke to Carney, Carney's behavior improved for about four weeks. During the week of July 5-11, 1995, however, Carney returned to his prior patterns of behavior. Pollard's Test., Tr. at 107. Another incident in which the vaporizer was taken out early without plaintiff's knowledge also occurred during this week. Id. at 89. Plaintiff went to David Swartz and begged him to "just get me off this shift, nothing's changed and I can't take it." Id. at 107. Rather than investigating the situation or moving Carney to another shift, Swartz spoke to plaintiff the next day and informed her that a control room operator position on another shift was available. Id. at 108; Swartz's Test., Tr. at 994-96. Plaintiff did not want to take this position because it was on the same shift with Rory Bricco, the man who had refused to take direction from her when she was a control room operator

on "C" shift. Plaintiff told Swartz she would not bid for that position. Pollard's Test., Tr. at 108-09.

On July 28, 1995, plaintiff discovered a highlighted copy of the same Bible verse that Bricco had put on her desk when he refused to take direction from her in her mailbox at work. As noted above, that Bible verse read: "A woman should learn in quietness and full submission. I do not permit a woman to teach or have authority over a man, she must be silent." Tr. at 407 (quoting 1 Timothy 2:11). When plaintiff discovered the Bible verse, she described her reaction as follows:

> I felt like I had been hit with a brick, I just couldn't believe that after all that had been talked about, they were asking me to go back into the control room . . . and I just considered [that] this was the men's answer to that.

Pollard's Test., Tr. at 110.

Subsequent to that event, plaintiff never returned to work at DuPont. A committee was formed to investigate the Bible verse incident. As with the other "investigations" that DuPont had initiated with regard to plaintiff's complaints, this one was wretchedly inadequate. The investigation consisted of asking an identical series of typed questions to each of the men on "A" shift individually, and to the other men in the peroxide area in groups. Shaw's Test., Tr. at 1106. All of the questions were answerable with a simple yes or no, and when all of the men denied having any knowledge of the incident, DuPont proceeded no further with the investigation. Shaw's Test., Tr. at 1268, 1270. No one from DuPont management ever questioned Steve Carney about whether he

was involved in the Bible verse incident. Carney's Test., Tr. at 931.

After plaintiff left "A" shift, a party was held to celebrate her departure. Cobb's Test., Tr. at 277-79; Carney's Test., Tr. at 931-32. Steve Carney fried catfish and crappie that he had brought in, and the other men blew up balloons and taped them to the ceiling. Id. Mark Cobb testified that at the party Carney declared, "glad the bitch is gone, glad the bitch is not coming back." Cobb's Test., Tr. at 278. Carney himself testified as follows:

> Q: Now, after she [plaintiff] left, there was a party in the peroxide are, wasn't there?
> A: Yes, ma'am.
> Q: And you participated in that party, correct?
> A: Yes, ma'am.
> Q: And there were balloons at that party, correct?
> A: Yes, ma'am.
> Q: And I believe there was crappie cooked, correct?
> A: Yes, ma'am.
> Q: And you do recall that, don't you?
> A: Yes, ma'am.
> Q: You were celebrating the departure of Sharon Pollard, weren't you?
> A: Yes, ma'am.

Carney's Test., Tr. at 931-32.

Plaintiff was on short-term disability leave for the next six months, during which time she saw a number of psychologists and psychiatrists that DuPont required her to visit. In particular, DuPont sent plaintiff to Dr. Fred

Steinberg, who concluded she could not return to work. In spite of this opinion, however, DuPont scheduled a "return to work" meeting with plaintiff in February of 1996. At that meeting DuPont management would not guarantee that plaintiff would not be put back on a shift with Carney. Pollard's Test., Tr. at 219. Plaintiff told them that she could not return to work under those conditions, and DuPont terminated her, effective February 29, 1996. Id. at 154, 217-19.

CONCLUSIONS OF LAW

Title VII prohibits discrimination "against any individual with respect to [her] compensation, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) . In Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986), the Supreme Court held that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex created a hostile or abusive work environment. As noted by the Sixth Circuit in Black v. Zaring Homes, Inc., 104 F.3d 822, 825 (6th Cir. 1997), the statute grants employees "the right to be work in an environment free from discriminatory intimidation, ridicule, and insult." 104 F.3d at 825 (quoting Meritor, 477 U.S. at 65).

In order to succeed on a hostile work environment claim, a plaintiff must prove the following elements: 1) the plaintiff is a member of a protected class; 2) the plaintiff was subject to unwelcomed sexual harassment; 3) the harassment complained of was based on sex; 4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive work environment; and 5) the employer knew, or should have known, of the charged sexual

harassment, and failed to take prompt and appropriate corrective action. Fleenor v. Hewitt Soap Co., 81 F.3d 48, 49 (6th Cir. 1996).

There is no question that plaintiff satisfies the first two elements as required by Fleenor. First, as a woman, plaintiff is a member of a protected class. Second, it is clear from plaintiff's repeated complaints, initially to her supervisor David Swartz and later to other members of DuPont management, including Shaw, Rice, Scales, and Basham, that the harassment plaintiff was experiencing was unwelcome.[16]

With regard to the third element of the Fleenor test, the Court concludes that plaintiff has unequivocally established that the harassment she experienced was based on her gender. As recently clarified by the Supreme Court in Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998), harassment based on gender need not be sexual in nature:

> Harassing conduct need not be motivated by sexual desire to support an inference of discrimination based on sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.

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[16] Moreover, plaintiff's repeated complaints during the Women's Network meetings, and to the other members of "A" shift during the two "healing" meetings held in December 1994, further support the Court's conclusion that the harassment was unwelcome.

Oncale, 118 S. Ct. at 1002 (emphasis added).

As noted above, the record is replete with evidence that several of the men in the peroxide area were "motivated by general hostility to women in the workplace," and felt strongly that women did not belong in the peroxide area. Cobb's Test., Tr. at 246-47, 251, 359, 361; Walker's Test., Tr. at 746-47; Basham's Test., Tr. at 1195. Specifically as to plaintiff's shift, Steve Carney stated that women didn't belong there approximately five times per week, and routinely referred to women as "bitches" and "cunts." Cobb's Test., Tr. at 264, 266; Lee's Test., Tr. at 491-92; Walker's Test., Tr. at 751-52. Use of the term "heifer" to refer to women was commonplace behavior by men in the peroxide area. Moody's Test., Tr. at 697; Lee's Test., Tr. at 489-90; Walker's Test., Tr. at 723.

Carney himself testified that he referred to women as "heifers" and that he referred to plaintiff as a "bitch" and a "split tail."[17] Carney's Test., Tr. 908-09. Carney, and the other men on "A" shift, repeatedly voiced their objections to the Women's Network and to DuPont's participation in "Take Your Daughters to Work Day." Even Beth Basham, DuPont's unit supervisor of the peroxide area, conceded that she "was of the firm belief that plaintiff had been harassed on account of her sex in the peroxide area." Basham's Test., Tr. at 1217. Finally, the content of the Bible verse placed in plaintiff's mailbox on July 28, 1995, leaves absolutely no doubt in the Court's mind that the harassment of plaintiff was based on her gender.

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[17] The Court notes that several witnesses testified that they considered Carney to be a "leader." Walker's Test., Tr. at 757; Swartz's Test., Tr. at 992.

As to the question of whether the harassment was pervasive enough to constitute a hostile work environment and unreasonably interfere with plaintiff's work performance, the Supreme Court reaffirmed the standard set forth in Meritor, and further clarified it in Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). In Harris, the Court explained that the conduct must be judged by both an objective and subjective standard. 510 U.S. at 21-22. Accordingly, "the conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as abusive." Black, 104 F.3d at 826 (citing Harris, 510 U.S. at 21-22.) "This standard...takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." Harris, 510 U.S. at 21.

The Supreme Court acknowledged that this approach is not susceptible to a "mathematically precise test," id. at 22, but sought to provide some guidance with regard to the determination of whether a work environment was objectively hostile or abusive. The Court explained that all of the circumstances should be considered, and offered a non-exhaustive list of relevant factors, including:

> The frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it- unreasonably interferes with an employee's performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while

> psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id. at 23.

Based on the evidence set forth above, the Court concludes that harassment faced by plaintiff while she was on the "A" shift at DuPont, and specifically during the December 1994 through December of 1995 period relevant to liability in this case, constituted a pervasively hostile environment and unreasonably interfered with her work performance. The false alarms, failure to communicate alarms and other information necessary for plaintiff's job, and the early removal of the vaporizers at Carney's instruction on several occasions, are examples of direct interference with plaintiff's execution of her job duties. This kind of deliberate tampering with plaintiff's area of responsibility could have, and very well may have, resulted in safety risks or production shortages, and made plaintiff appear incompetent to the # 3 operator on the next shift.

Moreover, as Justice Ginsburg noted in her concurring opinion in Harris, to show unreasonable interference with a plaintiff's work performance, "'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.'" 510 U.S. 17, 25, 114 S. Ct. 367, 126 L. Ed. 2d 295 (Ginsburg, J., concurring)(quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988). The Court finds that plaintiff has demonstrated that the harassment so altered her working

conditions as to make it more difficult to do her job, on both an objective and subjective level.

Plaintiff testified that she suffered from nightmares, fear of crowds, nausea, anxiety, and sleeplessness. A psychologist and a psychiatrist who saw plaintiff both concluded that she suffered from post-traumatic stress disorder. See Testimony of Dr. Janet Hill, Tr. 775-851; Testimony of Dr. Richard Farmer, Tr. 502-79. Several witnesses testified about the dramatic change in plaintiff's personality during this time period. Jenks' Test., Tr. at 418; Testimony of Charlotte Blaylock, Tr. at 442-44; Testimony of John Pollard, Tr. at 451-52.

Plaintiff testified extensively about the enormous psychological effect the long-term campaign of harassment, intimidation, and isolation executed by the men on "A" shift had on her mental and emotional state. Plaintiff stated that the last straw in the long ordeal, the placing of the Bible verse in her mailbox at work, so upset her and interfered with her ability to perform her job that she left her position at the plant where she had worked for the past seventeen years and did not return. Accordingly, the Court concludes that plaintiff has satisfied the fourth requirement necessary for a hostile environment claim, in that she has demonstrated that the harassment "unreasonably interfered with [her] work performance and created an intimidating, hostile, [and] offensive working environment." Fleenor v. Hewitt Soap Co., 81 F.3d 48, 49 (6th Cir. 1996).

Finally, the Court must consider whether DuPont knew, or should have known, of the charged sexual harassment and failed to take prompt and appropriate corrective action. The evidence on this point is overwhelming. As set forth above, beginning in the spring of

1994, plaintiff complained about the lack of communication, constant disparaging remarks about women, and the sabotage of her work by the men on her shift to her supervisor, David Swartz.

Time and time again, after receiving these complaints from plaintiff,[18] Swartz either made a half-hearted attempt to speak to Carney, which ended as soon as Carney denied the conduct, or did nothing at all. Carney testified that after a few attempts, Swartz quit talking to him because he was "hard-headed" and Swartz knew "there wasn't no sense [sic] in saying anything else." Carney's Test., Tr. at 883-84. Swartz himself conceded that his efforts to remedy the situation "didn't seem to work." Swartz's Test., Tr. at 955. However, Swartz took no further steps to end the campaign of harassment being waged against plaintiff by the men on "A" shift.

Swartz testified that, at least after the softball coach incident in May of 1994, he spoke to his supervisor Alan Hubbell about the situation in peroxide. Swartz's Test., Tr. at 952. In spite of the fact that the situation did not improve, Hubbell never followed-up on the situation or initiated any

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[18] The Court notes that the testimony of both plaintiff and Swartz reveals that plaintiff discussed her situation with Swartz throughout the latter half of 1994 and in 1995. As to specific instances, however, the record reveals that Swartz was on notice of plaintiff's complaints in May of 1994 after Carney's comment that "women had no business coaching" at the training meeting, during the summer of 1994 when plaintiff complained to Swartz the day after her bicycle tires were cut, and in December 1994 when Swartz was present at the two "healing meetings" at which plaintiff set forth all of her complaints and concerns. Swartz's Test., Tr. at 949-50, 979-80, 958, 959-60, 993.

kind of formal investigation. Beth Basham, the highest-ranked supervisor in the peroxide area, testified that she was on notice of the harassment plaintiff was experiencing based on her attendance at Women's Network meeting at which plaintiff spoke about her situation. Basham, Tr. at 1184, 1194-95. Just as with Swartz, however, Basham did nothing to investigate the situation or discipline the individuals involved. After Bob Shaw, employee relations manager for the Memphis plant, became aware that this harassment had been ongoing since 1994, Shaw spoke to Carney about it, but never formally disciplined him in any way. Bernie Scales, from DuPont headquarters, was aware of the situation based on plaintiff's meeting with him on May 25, 1995. However, no one from DuPont's headquarters ever visited the Memphis plant to follow-up on plaintiff's situation or conduct an investigation of her allegations.

Several witnesses testified that DuPont has a progressive disciplinary system in which employees are to receive increasingly severe sanctions if the misconduct at issue does not cease. Sanctions in this system range from an informal oral reprimand to termination. In spite of all of the complaints plaintiff made against him, and the fact that the situation did not improve, Steve Carney never received a formal written reprimand, was never suspended from his job, and was never transferred to another shift, demoted, or terminated. Basham's Test., Tr. at 1223; Carney's Test., Tr. at 903-04.

This situation was reprehensible. This is a case of wretched indifference to an employee who was slowly drowning in an environment that was completely unacceptable, while her employer sat by and watched. Plaintiff repeatedly complained to DuPont management to no avail. Accordingly, the Court concludes, without reservation,

that DuPont knew of the charged sexual harassment and utterly failed to take prompt and appropriate corrective action.

Plaintiff has, therefore, satisfied each of the elements necessary to prove that she was subjected to a hostile work environment based on her gender in violation of Title VII, and judgment is ENTERED in favor of plaintiff as follows:

1. Defendant is ORDERED to pay plaintiff $ 107,364.00 in back pay and accrued benefits;

2. Defendant is ORDERED to pay plaintiff $ 300,000.00 in compensatory damages,[19] in accordance with the

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[19] The amount of compensatory damages includes front pay, pursuant to the Sixth Circuit's holding in Hudson v. Reno, 130 F.3d 1193, 1204 (6th Cir. 1997) ("We conclude that front pay is subject to the caps on future pecuniary losses as provided in § 1981a(b)(3) because front pay is a 'future pecuniary loss.'") The Court notes that the $ 300,000.00 award is, in fact, insufficient to compensate plaintiff for the psychological damage, pain, and humiliation she has suffered, in addition to the loss of a lucrative career and secure retirement. The Court is bound by the statutory cap set forth in § 1981a however, and cannot award plaintiff compensatory damages in excess of that cap.

Because the amount of compensatory damages awarded by the Court is $ 300,000.00, the Court is thus prohibited by the statutory cap from awarding plaintiff any punitive damages. See 42 U.S.C. § 1981a(b)(3) ("The sum of the amount of compensatory damages awarded...and the amount of punitive damages awarded . . .shall not exceed . . . $ 300,000.00"). For the record, however, the Court finds that punitive damages are justified in this case, as defendant has "engaged in a discriminatory practice with malice or with reckless indifference to the federally protected rights of an aggrieved individual," 42 U.S.C. § 1981a(b)(1), and, absent the

statutory cap set forth in 42 U.S.C. § 1981a(b)(3); and

3. Defendant is ORDERED to pay plaintiff's attorney fees and costs. Plaintiff shall submit a statement of fees and costs related to this matter to the Court by September 15, 1998. Defendant may file a response to plaintiff's submittal by September 30, 1998. The Court will then determine the appropriate amount of attorneys fees and costs to be awarded, and will so advise the parties.

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statutory cap, the Court would have awarded punitive damages based upon DuPont's repeated failure to remedy this egregious situation.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed August 20, 1998]

No.95-3010 M1/V

SHARON B. POLLARD,
Plaintiff,

v.

E.I. DUPONT DE NEMOURS, INC.,
Defendant.

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that, in accordance with the Memorandum Opinion and Order, filed August 20, 1998, judgment is ENTERED in favor of plaintiff as follows:

a. Defendant is ORDERED to pay plaintiff $107,364.00 in back pay and accrued benefits;

b. Defendant is ORDERED to pay plaintiff $300,000.00 in compensatory damages, in accordance with the statutory cap set forth in 42 U.S.C. § 198la(b) (3); and

c. Defendant is ORDERED to pay plaintiff's attorney fees and costs. Plaintiff shall submit a statement of fees and costs related to this matter to the Court by September 15, 1998. Defendant may file a response to plaintiff's submittal by September 30, 1998. The Court will then determine the appropriate amount of attorneys fees and costs to be awarded, and will so advise the parties.

This document entered on docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 8/20/98.

APPROVED:

/s/_____
JON PHIPPS MCCALLA
UNITED STATES DISTRICT COURT

August 20, 1998
Date

/s/_____
ROBERT R. DI TROLIO
Clerk of Court

_____
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed May 26, 2000]

Nos. 98-6317 / 6319; 99-5125

Sharon B. Pollard,	)
Plaintiff-Appellee/	)
Cross-Appellant,	)
	)
v.	)
	)
E. I. DuPont de Nemours	)
Company,	)
Defendant-Appellant/	)
Cross-Appellee.	)
	)

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 95-3010--Jon Phipps McCalla, District Judge.

Before: MERRITT, CLAY, and CUDAHY,* Circuit Judges.

OPINION

MERRITT, Circuit Judge. Sharon Pollard and her husband brought this action against her employer, DuPont, for "continuing harassment based on her sex since 1987"

* The Honorable Richard D. Cudahy, Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

under Title VII, as well as the common law injuries of intentional infliction of emotional distress, negligent supervision, and loss of consortium. The district court found that she was subjected to co-worker hostile work environment sexual harassment, that her DuPont supervisors were well aware of the discrimination, and that it resulted in a medical leave of absence from her job for psychological assistance and her eventual dismissal for refusing to return to the same hostile environment. We agree with the district court that the record demonstrates that DuPont employees engaged in flagrant discrimination based on gender and that DuPont managers and supervisors did not take adequate steps to stop it.

The claim of sexual harassment was tried before the court instead of a jury. Judge McCalla was so persuaded by Pollard's claim that in his order he concluded that "[t]his is a case of wretched indifference to an employee who was slowly drowning in an environment that was completely unacceptable, while her employer sat by and watched." The court awarded Pollard $107,364 in back pay and benefits, $300,000 in compensatory damages, the maximum permitted by the statutory cap, and attorney's fees in the amount of $252,997.38. DuPont now appeals the court's decisions, arguing 1) that there was no harassment or discrimination based on gender and that the trial court's factual finding that DuPont had actual knowledge of and responded indifferently to Pollard's harassment was clearly erroneous, 2) that the denial of judgment as a matter of law was improper because Pollard's claim was one of retaliation, not harassment, 3) that Pollard's harassment claim failed because she failed to show disparate treatment, 4) that judicial bias, hostility, and predetermination of facts precluded DuPont's receipt of a fair trial, and 5) that the award of attorney's fees to plaintiff was unreasonable.

Pollard cross-appeals on the bases that 1) front pay should not be subject to limitations on damages under § 1981a, 2) the statutory cap on compensatory damages is unconstitutional because it violates the doctrine of separation of powers and the Equal Protection Clause, and 3) the district court erred in granting summary judgment on Pollard's claim of intentional infliction of emotional distress.

I. Facts

The district court's findings of fact are summarized as follows: Pollard began working for DuPont in 1977. In 1978 she was promoted to "assistant operator," and she was transferred to the hydrogen peroxide area of the plant in 1979. Of the approximately 28 employees in peroxide, four were women. Pollard was promoted to operator in 1987, and worked on "C" shift as one of the three operators on that shift until 1992. On each shift, operator #1 is the control room operator, and operators #2 and #3 work in other areas of peroxide manufacture, keeping the pipes, valves and other machinery operating. Each operator's duties are different and none is superior in rank to the others. While Pollard was working on "C" shift, one of the assistant operators named Rory Brico refused to take direction from plaintiff because she was a woman. He placed a Bible on her desk open to the passage "I do not permit a woman to teach or have authority over man. She must be silent."

After that incident, plaintiff was transferred and became the #3 operator on "A" shift in 1992. The other operators on her shift were Steve Carney, the control room operator, and Jerry Lee, and the assistant operators were named Moody, Walker, and Cobb. The shift supervisor was David Swartz. During 1992 and 1993, the members of "A" shift got along without incident. In February 1994 the

atmosphere abruptly changed. DuPont announced that it was going to participate in national Take Your Daughters to Work Day in April 1994, and Pollard was asked to give a talk to a group of girls coming to visit the plant. Some of the men on "A" shift, particularly Steve Carney and Jerry Lee, loudly complained about DuPont's participation in the program. A number of other men in peroxide were also against it, and they circulated an email entitled "Bull Malarky" to everyone in the plant discussing their displeasure with the program.

After plaintiff had discussions with both Steve Carney and Jerry Lee about Take Your Daughters to Work Day in early 1994, all of the men on the shift (with the exception of Mark Cobb, an assistant operator), stopped talking to plaintiff. Cobb's testimony, which was basically undisputed, indicated that Steve Carney, the control room operator, instructed all of the men on "A" shift to not eat with her, share food with her, be in the break room with her, or talk to her, and that Carney instructed the men not to follow any of Pollard's instructions without consulting with him first. Carney admitted in his testimony that "it was a possibility" that he had told the other men to disregard Pollard's directions.

It was common knowledge in the peroxide area that many of the men including Carney, Jerry Lee, and Rory Brico (of the Bible verse incident) did not approve of women working in the peroxide department. Testimony proved that Carney made remarks to this effect approximately five times per week, consistently, and that Carney routinely referred to women as "bitches," "cunts," "heifers," and "split tails." This language was commonly used by several men in peroxide, and Carney admitted that he used the terms to refer to women in general and to plaintiff in particular. In addition, DuPont had a company-sponsor support group called the

Women's Network which the men vocally disapproved of Pollard attending. Plaintiff worked in this hostile environment for the next year and half.

In May 1994, after about two months of this treatment, David Swartz, the shift supervisor, held a training meeting. During a break in the meeting, Carney and Walker were having a discussion about a girl's softball team during which Carney said "that heifer can't coach" and "women have no business coaching" in reference to the woman who coached the team. Plaintiff was seated across the table, became upset, and asked to leave the meeting. She went to the nurse's station and asked the nurse to call David Swartz. When Swartz arrived, Pollard told Swartz that she could not take it anymore and that she was tired of the men always saying women couldn't do anything and degrading women. Swartz spoke with his supervisor about the incident, and they decided that Swartz should speak with the men individually about it. With the exception of Walker, none of the men on the shift remembered Swartz speaking with them about it. Carney testified that Swartz did approach him about not communicating with plaintiff immediately after the tension started in February, but that Swartz gave up on trying to talk to him about it because, according to Carney, "he knows I'm hardheaded . . . [and there] wasn't no sense in saying anything else." In other words, Carney made it plain he was not going to change his behavior.

Swartz testified that he knew there was tension on the shift beginning in the spring of 1994 and that it did not improve for the rest of the year. He specifically testified that plaintiff complained to him about the lack of communication and isolation and other gender-based conduct on several occasions. The situation worsened in the summer of 1994. Plaintiff and Mark Cobb testified that Carney would go so far

as to set off false alarms in plaintiff's area, causing her to run around the peroxide area in search of a non-existent problem. Cobb testified that Carney bragged to the other men that this was his way of showing that he, a man, was in control. If a false alarm was set while Pollard was on break cooking her dinner, the men would turn up the stove to burn her food while she was searching for the problem. In addition, Cobb testified that there were numerous incidents during which Carney would not tell plaintiff about actual alarms in her area. Plaintiff would therefore not respond to the problem, and it would appear to the operator on the next shift that she was not doing her job.

Plaintiff's job duties included monitoring the vaporizers in the peroxide tanks and determining when they should be moved. She was to sample the peroxide in a tank one hour after it was moved, and any delay would result in a weak product. Carney admitted instructing the assistant operators on several occasions to remove the vaporizers from the tanks earlier than plaintiff instructed without telling her. Again, this made it appear to the operator on the next shift that plaintiff was not doing her job, and additionally it affected whether customers would receive their shipments on time. This happened approximately seven times in 1994 and 1995, according to Pollard, with the last incident occurring in July 1995. After the first incident she spoke to the assistant operators about it, and they informed her that they were following Carney's instructions. After the second incident, Pollard spoke with Swartz about the problem. Pollard discussed these ongoing communication problems with Swartz on numerous occasions. Swartz would tell Carney that he must call out the alarms and communicate with plaintiff, but Carney would tell Swartz that he was doing his job, and that Pollard was simply not doing her job. Swartz did not

investigate further or discipline Carney. Carney was never suspended or fired for this behavior.

During the summer of 1994 plaintiff found the tires on the bicycle she rode from the gate to her section of the plant had been slashed. That day, Pollard complained to Swartz that she suspected Carney had done it. Swartz spoke with Carney, and he denied having done it. Swartz did not investigate further.

In December 1994, two of the assistant operators, Mark Cobb and David Walker, approached Swartz and asked him to call a meeting to discuss the treatment of Pollard by Carney and the other men. Swartz scheduled a meeting which they called the "first healing meeting." Carney was on vacation the day of the meeting. At the meeting, Walker and Moody told Pollard that Carney told them not to talk to her or communicate with her, and that Carney told them that Pollard was "keeping a book on them." Pollard told them that she was not doing so, and stressed the importance of communicating with her in order for her to do her job and to avoid possible dangerous consequences. David Swartz was present and heard all of plaintiffs complaint's at this meeting.

Carney returned from vacation and was angry that a meeting had been held without him. He demanded a second meeting. During that meeting, plaintiff reiterated her concerns about the lack of communication and other problems. Plaintiff also mentioned her bicycle tire slashing, and told the group of another incident in which she believed Carney tried to run her off the road as she left the plant. Carney "got in plaintiff's face" and said "Nobody in this area likes you, you're here all alone, it's all your own fault." When plaintiff asked Swartz if he was going to allow Carney to talk to her that way, Swartz said "I think that's enough"

and ended the meeting. Nothing happened to change the situation.

The tension continued, and plaintiff continued to complain, both to Swartz and in her Women's Network meetings. Pollard told the group she was afraid for her safety and was concerned that a dangerous situation might arise in the peroxide area of which the men would not inform her. Beth Basham, David Swartz's supervisor, attended these meetings. She testified that she heard Pollard's complaints, and recognized that the problem in the peroxide area was due to the male workers not accepting a woman working in that area. In answer to a question on cross-examination, Basham testified that she was "of the firm belief that plaintiff had been harassed on account of her sex in the peroxide area." Basham, however, never investigated Pollard's complaints further.

In the face of this record, and despite the express testimony of management officials Basham and Swartz that they knew of the sexual harassment, counsel for DuPont – both at trial and in their briefs on appeal – maintain that there was no sexual harassment and that no DuPont managers had any knowledge of harassment. At oral argument on appeal, the following testimony from Basham, the general overall supervisor of the peroxide department, was read to Ms. N. Victoria Holladay, counsel for DuPont:

> Q: And you were of the firm belief that she had been harassed on account of her sex in the peroxide area, correct?
>
> A: Yes.

Q: Now, you talked about this situation with Alan Hubbell on several occasions, did you not?

A: Yes.

Q: And Mr. Hubbell's position in 1994-'95 was what?

A: He was the area manager of hydrogen peroxide.

Joint Appendix at 412. In the face of this testimony expressly acknowledging sexual harassment and knowledge, counsel maintained that there was no such harassment and no knowledge by DuPont management.

In May 1995, a specialist in diversity training from DuPont headquarters named Bernie Scales attended the Women's Network meeting. Pollard told Scales of the problems in the peroxide area. Scales spoke to the plant manager about the problem, who subsequently spoke to Bob Shaw, employee relations manager for the plant. Shaw, Lee Ann Rice, and Gary Fish met with plaintiff on May 28, 1995 to discuss her complaints. According to Shaw and Rice, Pollard recounted fully all of her complaints at this meeting. Subsequently, Shaw and Rice spoke to Carney about his behavior. Carney never received a formal written reprimand, was never suspended, transferred, demoted, terminated, or in any other way disciplined for his behavior. There was no further investigation.

Carney's behavior improved for about a month (June 1995); he then returned to his old patterns of behavior in early July 1995. Plaintiff asked David Swartz to transfer her to

another shift. Swartz offered to transfer her to the control room operator position on shift "C" with Rory Bricco, the man who had refused to take direction from her when he had been an assistant operator under her some years before, and who had initiated the Bible incident at that time. Plaintiff declined that offer. In late July 1995, Pollard discovered a highlighted copy of that same Bible verse in her locker, stating "A woman should learn in quietness and full submission. I do not permit a woman to teach or have authority over a man, she must be silent." Upon finding the note, plaintiff requested a medical leave of absence from DuPont.

In order to investigate the bible verse incident, DuPont formed a list of identical questions, answerable by a simple yes or no. When each employee denied having knowledge of the incident, no further questions were asked and the investigation was stopped. Carney himself was never questioned about his knowledge of who had placed the verse in Pollard's locker because he was on vacation at the time it occurred.

After Pollard left "A" shift, the entire shift, including supervisor David Swartz, held a party. They taped balloons to the ceiling and had a fish fry. The purpose of the party was to celebrate Pollard's departure, as Carney admitted in his testimony. Carney said at the party, "Glad the bitch is gone, glad the bitch is not coming back." David Swartz told Carney to shut up, that he did not need to hear Carney saying those things in case of future investigations concerning Pollard.

Plaintiff was on short-term disability leave for six months based in part on the advice of DuPont's psychologist. DuPont scheduled a "return to work" meeting in February of

1996 in spite of the psychologist's advice to the contrary, at which time DuPont told Pollard that they could not guarantee that she would not be put back on a shift with Steve Carney and the other members of "A" shift. When plaintiff declined to return to work under those conditions, DuPont fired her.

II. Hostile Work Environment Sexual Harassment

After reviewing the Supreme Court's decision in *Burlington Industries v. Ellerth,* 524 U.S. 742 (1998), we recently concluded that a plaintiff seeking to establish a company's liability for acts of her co-workers must show that the employer "knew or should have known of the charged sexual harassment and failed unreasonably to take prompt and appropriate corrective action." *Fenton v. HiSan, Inc.,* 174 F.3d 827, 830 (6th Cir. 1999).

Defendant DuPont challenges the district court's determination that plaintiff was harassed on the basis of her sex because the conduct, according to DuPont, was gender-neutral and non-sexual in nature. In order to prove that forms of conduct not inviting sexual relations constituted sexual harassment, plaintiff "'must show that but for the fact of her sex, she would not have been the object of harassment.'" *Williams v. General Motors Corp.,* 187 F.3d 553, 565 (6th Cir. 1999) (quoting *Henson v. City of Dundee,* 682 F.2d 897, 904 (11th Cir. 1982)).

As the district court found, there was overwhelming testimony as to the anti-female animus which the men in peroxide consistently demonstrated, specifically toward women working in the peroxide area (as opposed to women filling traditionally "female" jobs, such as secretaries and office workers in other areas of the DuPont compound). We have recited these facts in detail above.

Plaintiff must prove that, after considering the totality of the circumstances and the context in which certain treatment of plaintiff occurred, the harassment which she sustained was sufficiently pervasive and severe as to alter the conditions of her employment and create an abusive working environment. Each alleged act of harassment must not be viewed in a vacuum, but must be considered together with the other acts. Characteristics such as their frequency, intensity, and whether they "merely" created psychological trauma or whether they actually interfered with a plaintiffs work are all factors to be considered.

In the recent *Williams* decision, we determined that the following behavior was severe and pervasive enough to constitute harassment: co-workers who used foul language, such as "fuck" and "slut"; sexual innuendos concerning the plaintiff's breasts or sexual prowess; tasteless sexually-based jokes and puns directed toward plaintiff; co-workers conspiring against her in order to force her onto another shift; objects glued to the top of her desk; being told "I'm sick and tired of these fucking women" and having a box thrown at her simultaneously; being denied overtime and breaks; and other "pranks," such as being locked in a room, or finding materials blocking her way into or out of an area of the plant. *See Williams,* 187 F.3d at 559. This behavior seems clearly to encompass many types of sexual harassment: actual sexual propositioning, offensive language or behavior about women in general and women in the workplace, and non-sexual actions directed toward a plaintiff in order to interfere with her work. Plaintiff here proved daily sexually degrading comments about women which often occurred outside of her hearing; a co-worker who instructed the men working as her assistants not to take direction from plaintiff or talk to her at any time because of her gender; several incidents of plaintiff not being informed of facts concerning her job which would

result in an appearance of incompetence on her part, and which could be potentially physically dangerous to her and to other members of the plant; isolated incidents occurring within her hearing of women being called "heifers" and being degraded for their inability to accomplish tasks as well as men; being subjected to false alarms and practical jokes, such as her dinner being burned, with the alleged intent of driving plaintiff away from her shift; and the Bible verse concerning women's proper submissive role being placed in her locker. This conduct constitutes severe and pervasive harassment, just as severe and pervasive as in *Williams* and our other co-worker sexual harassment precedent.

Next, we address the issue of whether or not DuPont received actual or constructive notice of Pollard's complaints and responded reasonably. DuPont challenges the court's factual findings, arguing that the findings concerning DuPont's lack of responsiveness towards Pollard's numerous complaints were clearly erroneous. Specifically, as pointed out above, DuPont continues to argue that the testimony at trial failed to establish that DuPont was ever made aware that any sex-based derogatory comments were addressed to Pollard. This argument assumes that only sex-based derogatory language is actionable under Title VII, and fails to consider the testimony related to a lack of work-related communication, sabotage of plaintiffs work, and personal isolation and harassment, all of which was based on the belief that women should not work in the peroxide area.

After reviewing the trial testimony in this case, we believe that the trial court's findings of fact were correct. The testimony at trial indicated that plaintiff told her direct supervisor, David Swartz, of the incidents of harassment on numerous occasions. David Swartz, in particular, was independently aware of the language, isolation, and

communication problems on "A" shift through his own observations of the shift, even absent plaintiff's complaints to him. In addition, Beth Basham, David Swartz's supervisor, testified that although she believed, based on Pollard's complaints during Women's Network meetings, that Sharon Pollard was being harassed by her coworkers because they could not accept a woman working in the peroxide area, she never initiated any further investigation concerning the allegations. After the most blatant episode, when Pollard found the Bible verse in her locker, DuPont management interviewed the members of "A" shift with a list of yes-or-no questions, and when they responded "no" to the question concerning knowledge about the event, the interviews were concluded. The lack of an admission under such circumstances is not surprising. No member of the peroxide area was ever formally reprimanded, suspended, or transferred to another shift due to any of their actions. Finally, Bob Shaw confirmed in his testimony that Sharon Pollard was told that if she returned to work, she would be put back on the same shift with Steve Carney and the other members of "A" shift, although a woman would be added to the shift.

This testimony is countered by DuPont's arguments 1) that the men were instructed not to behave inappropriately and to continue to communicate with Pollard as to work-related matters once DuPont became aware of Pollard's work isolation; 2) that DuPont posted notices explaining what constituted inappropriate conduct after learning of the July 1995 Bible verse incident and explained that conduct of that nature would result in termination; 3) that a good-faith investigation, even if ineffective, should shield DuPont from liability; and 4) that her complaints to her direct supervisor, David Swartz, as well as the complaints made in the context of Women's Network meetings, were not actually complaints

to management about harassing conduct, and therefore did not put DuPont on actual notice of her problems. These arguments are not persuasive. Not only was it reasonable for the district court to conclude that members of DuPont management were actually aware of Pollard's harassment complaints, the district court was justified in finding that DuPont's reaction to Pollard's complaints did not constitute a "good faith" effort to remedy the situation. As noted above, this trial produced substantial evidence that several members of DuPont management were aware of Pollard's situation, both through her complaints and through first-hand experience, but they allowed the situation to fester without definitive action on the part of management. Steve Carney's behavior toward Pollard was well known. No disciplinary action was taken against him.

We next address DuPont's argument that Pollard's claim was one of retaliation, not sexual harassment, and thus that the decision holding that sexual harassment existed must be reversed. This is a red herring argument. There is nothing in Pollard's testimony, her complaints to DuPont, or her complaint initiating this action which indicates that DuPont took adverse action against her for complaining of the treatment she was receiving on "A" shift. The complaints indicate quite clearly that Pollard's problem was with her treatment by the other members of her shift and DuPont's inaction with respect to that problem, not any further action which DuPont took against her.

Finally, we turn to DuPont's claim that plaintiff cannot prevail on her claim of hostile work environment sexual harassment because she did not prove disparate treatment. Disparate treatment sexual harassment (assuming that by "disparate treatment" DuPont means harassment subject to the McDonnell Douglas test) is inherently different from hostile

work environment sexual harassment. The federal courts treat the two types of cases differently for good reason. The McDonnell Douglas framework is meant to prove that conduct which might have some otherwise legitimate motive (such as promoting a man instead of a woman) was in fact based upon discriminatory motive. When a plaintiff proves that a hostile work environment existed, there is no legitimate justification for such an environment, and thus recourse to the McDonnell Douglas test is not warranted. A defendant's only option is to deny the charges or argue that defendant effectively remedied the situation, not to submit that the hostile environment was in some way warranted. Additionally, as the Supreme Court recognized in *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 63-68 (1986), the proof of a hostile work environment is in fact part of "'the entire spectrum of disparate treatment of men and women'" in the workplace, which is in no way limited to actions which economically impact a plaintiff, such as decisions to hire, promote, or fire an employee. *Id.* at 64 (quoting *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702, 707 (1978)). In other words, the Supreme Court has long recognized that proof of hostile work environment sexual harassment is proof of disparate treatment. For these reasons, it is one of the most basic tenets of employment discrimination law that it is not necessary to prove economic disparate treatment in order to make out a prima facie case of coworker hostile environment sexual harassment. The defendant's argument to the contrary is based upon a fundamental misunderstanding of the law.

For the foregoing reasons, we AFFIRM the district court's opinion finding DuPont liable for the co-worker sexual harassment of its employees.

III. Judicial Bias

DuPont also claims that the trial judge was so biased in his approach to this trial that DuPont was denied the fundamental right to a fair trial. During the testimony of Bob Shaw, the final defense witness and the highest-ranking member of DuPont management who testified, Judge McCalla expressed his opinions with regard to this case. He angrily challenged Shaw and questioned him for a period of time, using language that was hostile and evidenced his desire to inform Shaw of the ways in which he believed DuPont had erred in their behavior towards Pollard. The court's comments seem to indicate three things: First, that after hearing all of the testimony (with only the remainder of Shaw's testimony to be heard), the court was quite convinced that the witnesses for the plaintiff were trustworthy and the key witnesses for the defense (the other members of "A" shift, including Steve Carney) were lying. Second, the court had also concluded that DuPont's actions in attempting to remedy the harassment were entirely unsatisfactory. And, finally, the court wanted Bob Shaw to hear his comments on the way DuPont handled this case so that DuPont could learn from its mistakes in this case and proceed differently in the future.

The standard of behavior expected of a judge is different when the case is tried to the bench rather than before a jury. The Supreme Court has recently concluded in language applicable to the conduct in this case:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable

> for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions."

Liteky v. United States, 510 U.S. 540, 550 (1994) (quoting *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2nd Cir. 1943)).

There is no indication in the case at hand that the district court was in any way personally biased for the plaintiff before the trial began, nor is there evidence that DuPont was treated unfairly during the course of the trial. The remarks were made just prior to the conclusion of the defense case, after the district court had heard the vast majority of the evidence before it. In the absence of any evidence that the district court was unfair in his dealings with the defense during the course of the trial, it is difficult for us to conclude that the judge was unfairly biased. In addition, since there was no jury which could have been improperly influenced by the comments, there is no compelling reason to subject this case to a retrial. We believe the court's comments stemmed from the conclusions which the judge had rightly formed as part of his factfinding duty, although the comments were spoken in anger and moral outrage in response to the injustice and harm DuPont and some of its employees visited upon plaintiff. It is difficult to read the record in this case without sympathy for the plaintiff who

endured, without relief, the cruelty of Steve Carney and other male co-workers at DuPont. We therefore DENY defendant's motion for a new trial.

IV. Attorney's Fees

DuPont challenges the district court's decision to award plaintiff attorney's fees. Attorney's fee awards are reviewed for an abuse of discretion. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). Attorney's fees are generally awarded for a reasonable number of hours expended multiplied by a reasonable fee, and are generally reduced in an amount reflective of the amount of time spent pursuing claims which were ultimately unsuccessful. DuPont argues that the award of attorney's fees ($252,997.38) should have been reduced due to the district court's summary judgment for the defense on the issues of intentional infliction of emotional distress, negligent supervision, and loss of consortium. DuPont also argues that the attorney's fees are excessively high. Plaintiff argues only that the fees were "reasonable." Neither party gives any explanation, either with or without mathematical calculations, as to why the fees were "reasonable" or "unreasonable." Without a more specific claim that the attorney's fees were unreasonable, it is difficult to conclude that the award constituted an abuse of discretion. This was a hard-fought case which has gone on for four years. We are offered no basis for setting aside the fees, and therefore AFFIRM the district court's award of attorney's fees.

V. Statutory Limitation of Front Pay

Pollard cross-appeals on the basis that front pay should not be subject to the limitations on "compensatory damages" under 42 U.S.C. § 1981a. The district court noted that it was

bound by this Circuit's decision in *Hudson v. Reno,* 130 F.3d 1193 (6th Cir. 1997), which held that front pay was subject to the $300,000 statutory cap because front pay was an element of future pecuniary losses. Pollard now argues that front pay is not an element of future pecuniary losses, but is instead a replacement for the remedy of reinstatement in situations where reinstatement would be inappropriate. The Equal Employment Opportunity Commission, in an amicus brief, agrees with Pollard that the *Hudson* case was wrongly decided.

First, the argument is made that § 1981a, by its very terms, explicitly excludes remedies which were traditionally available under Title VII from the statutory cap, and notes that front pay was a traditionally available remedy. Second, the argument is made that the legislative history of the statutory cap on compensatory damages clearly indicates that front pay was not intended to be included in it. Third, plaintiff claims that the *Hudson* decision misinterpreted existing Sixth Circuit cases examining the nature of front pay as a remedy. And finally, Pollard and the EEOC argue that public policy concerns weigh in favor of excluding front pay from the $300,000 statutory cap on compensatory damages and that other Circuits have reached a conclusion contrary to *Hudson. See Martini v. Federal Nat'l Mortgage Ass'n,* 178 F.3d 1336, 1348-49 (D.C. Cir. 1999); *Medlock v. Ortho Biotech, Inc.,* 164 F.3d 545, 556 (10th Cir. 1999); *Kramer v. Logan County Sch. Dist. No. R-I,* 157 F.3d 620, 625-26 (8th Cir. 1998). *See also Rivera v. Baccarat, Inc.,* 34 F. Supp.2d 870, 878 (S.D.N.Y. 1999); *Bizelli v. Parker Amchem,* 17 F. Supp.2d 949, 954 n.2 (E.D. Mo. 1998).

We agree with these arguments, but our hands are tied. One panel of this court may not overturn the decision of another panel of this court – that may only be accomplished

through an en banc consideration of the argument. Plaintiff does not purport to distinguish *Hudson*. Therefore, we must decline to overturn the district court's decision that front pay is included in the compensatory damages statutory cap found at 42 U.S.C. § 1981a.

VI. Constitutionality of the Statutory Cap on Damages

Plaintiff cross-appeals on the basis that the statutory cap on compensatory damages found at 42 U.S.C. § 1981a is an unconstitutional violation of the Separation of Powers doctrine. Pollard argues that by creating the statutory cap, Congress impermissibly encroached upon the judiciary and its "traditional responsibility" for assuring against excessive verdicts on a case-by-case basis. We do not find this argument persuasive. Congress created Title VII, and Congress may designate the remedies under Title VII. *See Northern Pipeline Construction v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982) (plurality opinion) (holding that where Congress creates a statutory right, "it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies.") The fact that the judicial branch is limited in the amount of damages which it may award does not mean that its ability to decide cases is being impaired by Congress.

Pollard also argues that the statutory damages provision violates the Equal Protection Clause of the Fourteenth Amendment in that it unfairly discriminates among those persons who wish to vindicate their rights with respect to racial discrimination and those who wish to vindicate their rights with respect to gender discrimination. Since the statute at issue is a federal one, we assume that plaintiff meant to invoke the implied equal protection clause inherent in the Due Process Clause of the Fifth Amendment, which is applicable

to the federal government. The parties agree that the statute must stand if it bears a rational relationship to any legitimate articulated government purpose.

42 U.S.C. § 1981a places a $300,000 statutory cap on all intentional discrimination on the basis of race, national origin, sex, religion, or disability (as defined in the Americans with Disabilities Act). The statute is inherently equitable on its face. The difference in the application of this statute in situations of gender or race discrimination occurs due to a provision in the Act which states that nothing in section 1981a is to be construed as in any way limiting the remedies provided in section 1981 itself, which does not limit recovery for intentional discrimination based upon race or national origin. However, section 1981 provides relief for a different type of claim than encompassed by the remedies available to plaintiff in section 1981a. Section 1981 provides for relief from discrimination in the making and enforcing of contracts, while section 1981a provides for relief purely from intentional discrimination in the employment context. While section 1981 includes contracts for employment, it also includes contracts for admission to organizations, insurance and other business contracts with private persons or corporations, and admission to schools. Plaintiff cannot therefore be said to be "similarly situated" with section 1981 claimants.

Even if plaintiff is similarly situated with a section 1981 claimant due to the fact that employment discrimination is covered under both acts, her claim still fails. Discrimination on the basis of race and national origin is indisputably the cornerstone of our entire body of civil rights law. In a political compromise, the Civil Rights Act of 1991 was limited in the remedies which it would provide due to a belief that unlimited damages for all forms of discrimination

would force employers to institute hiring quotas for their own economic safety. *See* 137 Cong. Rec. S15472-01 (discussing the fear of quotas that drove the compromise which was reached in the Civil Rights Act of 1991). The adoption of the provision saving the remedies available under section 1981 was rationally related to the legitimate purpose of creating reasonable damages available to all other victims of intentional discrimination without being forced to limit the damages already available to victims of racial and ethnic discrimination.

For the foregoing reasons, we AFFIRM the opinion of the district court limiting plaintiffs award pursuant to 42 U.S.C. § 1981a.

VII. Summary Judgment for the Defense on the Common Law Claims

Finally, plaintiff cross-appeals the district court's decision to grant summary judgment for the defense on plaintiff's claim of intentional infliction of emotional distress. The conduct alleged by a plaintiff must satisfy an extremely high burden in order to survive a motion for summary judgment with respect to a claim of intentional infliction of emotional distress in Tennessee. The district court in this case correctly quoted the appropriate language from *Dunn v. Moto Photo, Inc.*, 828 S.W.2d 747, 751 (Tenn. Ct. App. 1991), saying that the conduct must be that which would be deemed utterly intolerable in a civilized society. That case makes it clear that criminal, tortious, intentional, or malicious conduct does not automatically satisfy the standard. We believe, however, that the intentional and malicious conduct found by the district court in this case is unusually egregious and raises a factual issue with respect to the outrageousness of the behavior involved. The sort of daily, consistent harassing

behavior which Pollard endured over a period of months and years has been characterized as a type of slow torture. Her work was sabotaged, her personal safety was compromised, she was subjected to juvenile pranks intended to force her to resign from the shift, and she was repeatedly informed of her co-workers' belief in the inferiority of women. We found ourselves, after reviewing the record, proclaiming a sense of moral outrage that DuPont managers allowed the conduct of the men in the peroxide area to persist for years in silence, and therefore silent approval. Inaction by an employer, or another actor in a position to exercise control, in the face of continuous, deliberate, degrading treatment of another may rise to the level of intentional infliction of emotional distress. The tort would be unnecessary in our law as a deterrent if assault or physical harm were always made a necessary element.

We conclude that material issues of fact are presented by the outrageous nature of the conduct of DuPont employees together with the refusal of its managers to correct the situation and its blanket, continuing official denial in the face of contrary facts that discrimination based on gender occurred or that its managers were aware of the discrimination. A fact finder at the trial level will hear the case on remand and decide whether the plaintiff has met the standard enunciated by the Tennessee courts for the tort of intentional infliction of emotional distress. We therefore REVERSE the district court's decision to grant summary judgment to DuPont on this issue and REMAND for trial. Otherwise we AFFIRM the judgment of the district court. Plaintiff's [sic] motion to strike Pollard's reply brief is denied.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed August 25, 2000]

Nos. 98-6317 / 6319; 99-5125

SHARON B. POLLARD, *Plaintiff-Appellee/ Cross-Appellant,*	)
v.	)
E. I. DUPONT DE NEMOURS COMPANY, *Defendant-Appellant/ Cross-Appellee.*	)

ORDER

BEFORE: MERRITT, CLAY, and CUDAHY,* Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion of appellee/cross-appellant, and no

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* Hon. Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

judge of this court having requested a vote on the suggestion of appellant/cross-appellee, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk